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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decision

19 CFR Part 4

(T.D. 84-215)

Customs Regulations Amendment Adding Denmark to List of Nations Whose Pleasure Vessels Are Entitled To Be Issued U.S. Cruising Licenses

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by adding Denmark to the list of nations whose pleasure vessels may be issued U.S. cruising licenses. Customs has been informed that yachts used and employed exclusively as pleasure vessels and belonging to any resident of the U.S. are allowed to arrive at and depart from Danish ports and cruise in the waters of Denmark without being subjected to formal entry and clearance procedures. Therefore, Customs is extending reciprocal privileges to pleasure vessels belonging to any resident of Denmark.

EFFECTIVE DATE: These privileges became effective for Denmark on August 31, 1984.

FOR FURTHER INFORMATION: Paul Hegland, Carriers, Drawback and Bonds Division (202-566-5706), U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

Background

Section 4.94(a), Customs Regulations (19 CFR 4.94(a)), provides that U.S. vessels documented as yachts, used exclusively for pleasure, not engaged in any trade, and not violating the Customs or navigation laws of the U.S. may proceed from port to port in the U.S. or to foreign ports without entering and clearing, as long as they have not visited hovering vessels.

Generally, foreign-flag yachts entering the U.S. are required to comply with the laws applicable to foreign vessels arriving at, departing from, and proceeding between ports of the U.S. However, as provided in § 4.94(b), Customs Regulations (19 CFR 4.94(b)), pleasure vessels from certain countries may be issued cruising li-

censes which exempt them from formal entry and clearance procedures (e.g., filing manifests, obtaining permits to proceed and paying entry and clearance fees) at all but the first port of entry in the U.S. Yachts or pleasure vessels not carrying passengers or merchandise in trade are exempt from paying tonnage tax and light money in any case pursuant to § 4.21(b)(5), Customs Regulations (19 CFR 4.21(b)(5)). Cruising licenses are available to pleasure vessels of countries which extend reciprocal privileges to U.S. pleasure vessels. A list of these countries is set forth in § 4.94(b).

By letter dated August 17, 1984, the Embassy of Denmark, in Washington, D.C., informed the Department of State, which in turn informed Customs Headquarters by a letter dated August 30, 1984, that the Government of Denmark permits yachts used and employed exclusively as pleasure vessels and belonging to any resident of the U.S., to arrive at and depart from ports of Denmark and cruise the waters of Denmark without entering and clearing Danish Customs, and without the payment of any charges for entering or clearing, dues, duty per ton, tonnage taxes or charges for cruising licenses. The State Department and the Carriers, Drawback and Bonds Division of Customs are of the opinion that satisfactory evidence has been furnished to establish the reciprocity required in § 4.94(b). Therefore, on September 21, 1984, the Director of the division determined that, effective retroactively to August 31, 1984, Denmark should be added to the list of countries set forth in § 4.94(b).

By virtue of the authority vested in the President by § 5 of the Act of May 28, 1908, 35 Stat. 425, as amended (46 U.S.C. 104), the President has delegated the authority to issue these cruising licenses to the Secretary of the Treasury by E.O. 10289, September 17, 1951. By Treasury Department Order 165–25, the Secretary of the Treasury delegated authority to the Commissioner of Customs to prescribe regulations relating to § 4.94(b) and other sections of the Customs Regulations relating to lists of nations entitled to preferential treatment in Customs matters because of reciprocal privileges accorded to vessels and aircraft of the U.S. Subsequently, by Customs Delegation Order No. 66 (T.D. 82–201), dated October 13, 1982, the Commissioner delegated authority to issue these cruising licenses and to amend this section to the Assistant Commissioner (Commercial Operations), who redelegated this authority to the Director, Office of Regulations and Rulings, who then redelegated it to the Director, Regulations Control and Disclosure Law Division.

FINDING

On the basis of the information received from the Embassy of Denmark and the Department of State, as described above, it has been determined that the U.S. is in possession of satisfactory evidence regarding the passage of U.S. pleasure vessels through the ports and waters of Denmark without their being subjected to

formal entry and clearance procedures. Therefore, Denmark is added to the list of countries whose pleasure vessels may be issued U.S. cruising licenses.

Inapplicability of Public Notice and Delayed Effective Date Requirements

Because this amendment merely implements a statutory requirement and involves a matter in which the majority of the public is not particularly interested, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure thereon are unnecessary. Further, for the same reasons good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(d)(1).

Inapplicability of the Regulatory Flexibility Act

This document is not subject to the provisions of §§ 603 and 604 of Title 5, United States Code, as added by § 3 of Pub. L. 96-354, the "Regulatory Flexibility Act". That Act does not apply to any regulations such as this for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or any other statute.

Executive Order 12291

This amendment does not meet the criteria for a major regulation as defined in § 1(b) of E.O. 12291. Accordingly, a major impact analysis is not required.

Drafting Information

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects in 19 CFR Part 4

Customs inspection and duties, Imports, Vessels, Yachts.

Regulations Amendment

To reflect this change, § 4.94(b), Customs Regulations (19 CFR 4.94(b)), is amended by inserting, in alphabetical order between "Canada" and "Germany, Federal Republic of", the word "Denmark", to the list of countries whose yachts or pleasure vessels may be issued U.S. cruising licenses.

(R.S. 251, as amended, section 3, 23 Stat. 119, as amended, section 5, 35 Stat. 425, as amended, (5 U.S.C. 301, 19 U.S.C. 66, 624, 46 U.S.C. 3, 104))

Dated: October 19, 1984.

MARVIN M. AMERNICK,
Acting Director, Regulations Control and Disclosure Law Division.

[Published in the Federal Register, October 26, 1984 (49 FR 43049)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 158

Proposed Customs Regulations Amendment Relating to Entry Summary Filing

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations to allow importers to file entry summaries and pay duty for less than the invoiced and manifested number of packages in a "permitted" shipment, provided the importer submits both a discrepancy report and, in lieu of the carrier's declaration on the report (attesting to the shortage), copies of the dock receipt or other documents evidencing nonreceipt of the lost or missing packages. This amendment is necessary because the carrier is often reluctant to provide the declaration requested, thus forcing the importer to pay unnecessary duties on lost or missing packages and later claim a refund. The purpose of the amendment is to relieve importers of the burden of requiring them to obtain the carrier's declaration on the discrepancy report.

DATE: Comments must be received on or before December 24, 1984.

ADDRESS: Written comments (preferably in triplicate) may be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, U.S. Customs Service, Room 2426, 1301 Constitution Avenue NW., Washington, D.C. 20229.

Comments relating to the information collection aspects of the proposal should be addressed to the Commissioner of Customs, as noted above, and also to the Office of Information and Regulatory Affairs, Attention: Desk Officer for U.S. Customs Service, Office of Management and Budget, Washington, D.C. 20503.

FOR FURTHER INFORMATION CONTACT: Legal Aspects: Jerry C. Laderberg, Entry Procedures and Penalties Division (202-566-5765). Operational Aspects: Thomas Davis, Office of Cargo Enforcement and Facilitation (202-566-5354), U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 158.2, Customs Regulations (19 CFR 158.2), provides that an importer may file an entry summary for consumption or an entry summary for warehouse for less than the invoiced and manifested number of packages in a "permitted" shipment if he files with the entry summary a Customs Form 5931, in triplicate. Section 158.1 defines a permitted shipment as one in which Customs authorizes the carrier bringing the shipment to the port to make delivery to the consignee or the next carrier and:

(a) These parties in interest, or their agents, make a joint determination of the quantities being delivered, or,

(b) The carrier bringing the shipment to the port, at its option, independently declares the quantities available for delivery by filing with the district director, no later than the close of business on the next working day after a determination of quantities is made, a signed statement that:

(1) An independent determination of quantities of merchandise available for delivery has been made, with the date of the determination shown;

(2) At least 4 days have elapsed since the consignee or his agent was notified that Customs has authorized delivery; and,

(3) The merchandise was and is available for delivery.

The Customs Form 5931, titled "Discrepancy Report and Declaration," must be completed by both the importer and the importing or bonded carrier, as appropriate, and must contain a declaration by the carrier that the missing packages were not available for delivery within the provisions of section 448(a), Tariff Act of 1930, as amended (19 U.S.C. 1448(a)).

Section 158.3, Customs Regulations (19 CFR 158.3), provides that a refund shall be allowed for duties paid for lost or missing packages in a shipment included in an entry summary whenever it is established to the satisfaction of the district director of Customs, before liquidation of the entry summary becomes final, that the packages claimed to be lost or missing were not delivered to the consignee or another carrier. A claim for this allowance must be made on Customs Form 5931 completed by both the importer and the importing or bonded carrier. If the carrier refuses to complete Customs Form 5931, the claim may nevertheless be allowed if the importer completes Customs Form 5931 and attaches copies of the dock receipt or other documents evidencing nonreceipt of the lost or missing packages.

Under these regulations an importer who cannot obtain the immediate cooperation of the carrier in completing the Customs Form 5931 upon entry or presentation of the entry summary must pay the duty on the lost or missing packages and later seek a refund of the duty under section 158.3. Importers are thus forced to pay un-

necessary duties because of the carrier's refusal to cooperate or its delay in completing the form.

The proposed amendment to section 158.2 would relieve importers of the burden of obtaining the carrier's attestation to the shortage on Customs Form 5931 in order to file an entry summary for the actual number of packages in a shipment. The proposed amendment would allow importers to file an entry summary for the actual number of packages released, provided that they submit both Customs Form 5931 completed by them and, in lieu of the carrier's declaration on the form, copies of the dock receipt or other documents evidencing nonreceipt of the lost or missing packages. Importers would thereby be allowed to avail themselves of the relief offered in section 158.3 at the time the entry summary is filed, rather than at some later date before liquidation of the entry summary becomes final.

The change proposed by this document is currently operative in all Customs field offices, by virtue of a telex from Customs Headquarters dated June 6, 1983, instructing all field officers to make the change pending its incorporation into section 158.2. The amendment is necessary to ensure uniformity of application by Customs field officers and to inform the importing community of this change.

COMMENT

Before adopting this proposal, consideration will be given to any written comments (preferably in triplicate) that are submitted timely to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with section 103.11(b), Customs Regulations (19 CFR 103.11(b)), during regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Headquarters, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in section 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of section 605(b) of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601 *et seq.*), it is hereby certified that the proposed regulations set forth in this document will not have a significant economic impact on a substantial number of small entities. Accordingly, is it not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

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DRAFTING INFORMATION

The principal author of this document was Susan Terranova, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

PAPERWORK REDUCTION ACT

Pursuant to section 3504(h) of the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)), this document has been submitted to the Office of Management and Budget (OMB) for review and comment. Public comments relating to the information collection aspects of the proposal should be addressed to Customs and OMB at the addresses set forth in the ADDRESS portion of this document.

AUTHORITY

This amendment is proposed under the authority of R.S. 251, as amended (19 U.S.C. 66), section 1, 19 Stat. 247, 249 (19 U.S.C. 197), section 1, 36 Stat. 965 (19 U.S.C. 198), section 624, 46 Stat. 759 (19 U.S.C. 1624), section 641, 46 Stat. 759, as amended (19 U.S.C. 1641), section 648, 46 Stat. 762 (19 U.S.C. 1648).

LIST OF SUBJECTS IN 19 CFR PART 158

Customs duties and inspections, Imports, Freight.

PROPOSED AMENDMENT

It is proposed to amend section 158.2, Customs Regulations (19 CFR 158.2), to read as follows:

PART 158—RELIEF FROM DUTIES ON MERCHANDISE LOST, DAMAGED, ABANDONED, OR EXPORTED

158.2 Shortages in packages released under immediate delivery or entry.

An importer may file an entry summary for consumption or an entry summary for warehouse for less than the invoiced and manifested number of packages in a shipment "permitted" and delivered to him or deposited in a bonded warehouse under the immediate delivery procedure in section 142.21 of this chapter, or under the entry documentation in section 142.3(a), if he files with the entry summary a Customs Form 5931 in triplicate. The Customs Form 5931 shall be completed by the importer with attached copies of the dock receipt or other documents evidencing nonreceipt of the lost or missing packages.

ALFRED R. DE ANGELUS,
Commissioner of Customs.

Approved: July 2, 1984.

EDWARD T. STEVENSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, October 18, 1984 (49 FR 42576)]

U.S. Court of Appeals for the Federal Circuit

(Appeal Nos. 84-692/84-709)

ATLANTIC SUGAR, LTD., ET AL., APPELLEES *v.* THE UNITED STATES AND AMSTAR CORPORATION, APPELLANTS

(Decided: September 25, 1984)

Michael H. Stein, of Washington, D.C., argued for appellant. With him on the brief were *Michael P. Mabile,* Assistant General counsel and *William E. Perry.*

Thomas P. Ondeck, of Washington, D.C., argued for appellant, Amstar Corporation. With him on the brief was *B. Thomas Peele.*

Roger D. Chesley, of Washington, D.C., of counsel.

Roger A. Clark, of Washington, D.C., argued for appellee. With him on the brief was *Robert V. McIntyre.*

Appealed from: Court of International Trade.
Judge WATSON.

Before MILLER, *Circuit Judge,* COWEN, *Senior Circuit Judge,* and SMITH, *Circuit Judge.*

SMITH, *Circuit Judge.*

In this antidumping case, appellants, the United States (Government) and Amstar Corporation (Amstar), appeal from a Court of International Trade decision reversing an affirmative determination by the U.S. International Trade Commission (ITC) of regional industry injury, and vacating the resulting antidumping order. We reverse and reinstate the antidumping order.

ISSUES

We address two issues: (1) whether the lower court erred as a matter of law in holding that the aggregate data for Revere Sugar Corporation (Revere) did not constitute "best information available"; [1] and (2) whether the lower court erred in finding that the ITC injury determination was unsupported by substantial evidence on the record.

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[1] 19 U.S.C. § 1677e(b) (1982) set forth in opinion *infra.* All section references are to title 19, U.S.C. (1982), except where otherwise indicated.

BACKGROUND

We have before us the most recent [2] of five Court of International Trade decisions [3] concerning this Canadian sugar antidumping case. The case began in March 1979 when United States sugar producer Amstar filed an antidumping petition with the U.S. Treasury Department, alleging injury by reason of "dumped" imports of Canadian sugar (imports sold at less than fair value) and requesting relief in the form of antidumping duties on those imports.[4] Treasury exercised its right, under the law then in effect, to refer the case to the ITC for a preliminary injury assessment. In May 1979 the ITC determined that sufficient evidence of injury existed to warrant Treasury's continued investigation of the alleged dumping. In reaching this determination the ITC focused on data for injury to a regional, as opposed to a nationwide, sugar industry located in the Northeastern/Great Lakes area.

In early November 1979 Treasury found sales at less than fair value, with dumping margins on the Canadian sugar of approximately 20 percent. Consequently, the ITC promptly instituted its final injury investigation. Then on January 1, 1980, the Trade Agreements Act of 1979 [5] became effective, providing 75 days for the ITC to make a final material injury determination in any pending antidumping case.[6] More importantly, the new law specified precisely the criteria which the ITC was to apply in defining a regional industry: [7]

> (C) Regional industries.
>
> In appropriate circumstances, the United States, for a particular product market, may be divided into 2 or more markets and the producers within each market may be treated as if they were a separate industry if—
>
> (i) the producers within such market sell all or almost all of their production of the like product in question in that market, and
>
> (ii) the demand in that market is not supplied, to any substantial degree, by producers of the product in question located elsewhere in the United States.
>
> In such appropriate circumstances, material injury * * * of an industry may be found to exist with respect to an industry * * * if there is a concentration of * * * dumped imports into such an isolated market and if the producers of all, or almost all, of the

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[2] *Atlantic Sugar, Ltd.* v. *United States*, 573 F. Supp. 1142 (Ct. Int'l Trade 1983) (*Atlantic Sugar V*).

[3] *See* previous Court of International Trade opinions of same title as n.2 found at 553 F. Supp. 1055 (1982) (*Atlantic Sugar IV*); 2 Ct. Int'l Trade 295 (1981) (*Atlantic Sugar III*); 519 F. Supp. 916 (1981) (*Atlantic Sugar II*); 511 F. Supp. 819 (1981) (*Atlantic Sugar I*).

[4] Amstar filed under the then-applicable statute, the Antidumping Act of 1921, as amended (§§ 160 *et seq.* (repealed effective Jan. 1, 1880)), which provided for investigation of alleged less-than-fair-value imports by the Treasury Department. The ITC conducted the parallel injury investigation, as it does under current law. §§ 1673 *et seq.* Both investigations must result in affirmative determinations in order for the United States petitioner to receive the requested relief.

[5] Pub. L. No. 96-39, 93 Stat. 144, 162, repealing the Antidumping Act of 1921 (§§ 160 *et seq.*) and amending the Tariff Act of 1930 to insert the new antidumping statute at §§ 1673 *et seq.*

[6] Section 102 of Pub. L. No. 96-39, set forth at § 1671.

[7] Section 1677(4)(C).

production within that market are being materially injured * * * by reason of the * * * dumped imports.

During the final injury investigatory period the ITC staff endeavored to collect the extensive data necessary to determine whether a northeastern states' sugar industry existed which satisfied the above new, strict statutory definition, and, if so, what should be the scope of the region. This involved, among many other things, mailing questionnaires to the seven sugar producers in the suspected region, including the second largest, Revere. Revere's questionnaire, dated January 7, 1980, showed that Revere had three plants, located in Brooklyn, Boston, and Chicago. Revere gave the ITC confidential firm-wide data (*i.e.*, aggregated for all three plants) covering such information as Revere's production, sales, distribution of net sales (broken out by northeastern as opposed to other states), and profit-and-loss and other financial data.

By the end of January 1980 the ITC staff, in its report containing preliminary findings of fact, proposed an 11-state northeastern area excluding Illinois and Maryland. This meant that Revere's Chicago plant would be excluded from the region, as well as the Baltimore and Chicago plants of the proposed region's largest producer, Amstar. The ITC staff then worked with Amstar to segregate its data to exclude its plants outside the region. The staff did not do this with Revere, but toward the end of the investigatory period the principal staff investigator did telephone Revere to inquire about individual plant data. According to an affidavit by that investigator, Revere officials told him that "separate data on individual plant operations were not readily available." He also stated that Revere's president told him that the Chicago operation was "relatively minor" compared with the Boston and Brooklyn operations and that the Chicago operations were "not significantly different" from those of the other two plants.

The ITC staff presented its final report to the commissioners, and on March 6, 1980, they unanimously determined that an industry in the United States was being materially injured by reason of imports of sugars and syrups from Canada, which Treasury had determined to be sold in the United States at less than fair value. The commissioners defined the sugar "industry" according to the new statutory criteria and as recommended by the staff—the 11-state northeastern area. However, in the data on which the commissioners based their decision were the firmwide Revere figures, which included the extra-regional Chicago plant. In *Atlantic Sugar V* the Court of International Trade held inclusion of the Chicago plant data to be contrary to law and to cause the ITC's final injury determination to be unsupported by substantial evidence, resulting in that court's vacating the final antidumping order. We review these aspects of that court's decision.[8]

[8] We do not review the various other issues which that court addressed in *Atlantic Sugar I, II, III, IV, and V*, and which the parties have not here appealed, except that we do note some points where relevant.

OPINION

The statute specifies that the standard of judicial review of a final ITC material injury determination in an antidumping case is whether that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." [9] We therefore apply the substantial evidence standard in reviewing the ITC's factual determination that an industry in the United States was materially injured by reason of Canadian sugar sold in the United States at less than its fair value.[10] We address first, however, the alleged error of law concerning the trial court's rejection of the aggregate data for Revere's three plants as not in accordance with law.

1. *Best Information Otherwise Available*

The Government and Amstar contend that the ITC did not err in including the Chicago plant data in its injury determination, because the aggregate Revere data was the "best information otherwise available," as allowed by statute: [11]

> (b) Determinations to be made on best information available
>
> In making their determinations under this subtitle, the * * * Commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

Atlantic Sugar, a Canadian sugar producer, counters that the ITC should not benefit from the best information available rule because, to summarize, it was the ITC's own fault that Revere was "unable to produce [the] information requested in a timely manner and in the form required," as the statute states. The lower court rejected the applicability of the rule because the fact that segregated Revere data was not readily available "cannot be said to rise to the level of a refusal or inability to provide the requested information or a significant impediment, particularly given the critical importance of regional data to a regional investigation." [12]

Before analyzing further the parties' and lower court's views, we examine the rule itself, set forth above. We note the use of the mandatory term "shall," indicating that the ITC *must* use the best information otherwise available in the enumerated circumstances. This is reflected in the legislative history: [13]

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[9] Section 1516a(b)(1)(B).

[10] Our jurisdiction of the lower court's opinion on this matter is found at 28 U.S.C. § 1295(a)(5), granting us exclusive jurisdiction "of an appeal from a final decision of the United States Court of International Trade." We review that court's review of an ITC determination by applying anew the statute's express judicial review standard.

[11] Section 1677e(b).

[12] *Atlantic Sugar V*, 573 F. Supp. at 1145.

[13] S. REP. NO. 249, 96th Cong., 1st Sess. 98, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 381, 484.

> [This section] would provide that whenever a party or any other person refuses or is unable to produce information in a timely manner and in the form required, or otherwise significantly impedes an investigation, * * * the ITC *must* use the best information otherwise available. [Emphasis supplied.]

We also note the context of the best information rule: it is set within the extremely short statutory deadlines which the Congress built into the new antidumping law [14] and the resultant lack of time which the ITC has to wield its little-used subpoena power.[15] Thus cooperation by the parties to the investigation is essential, as well as diligence by the ITC staff, to gather the data needed for an accurate determination. Noncooperation by parties or other persons may, in the absence of ITC time to pursue judicial compliance, be penalized, at least in the eyes of those parties or persons, by the ITC's mandatory use of whatever other best information it may have available. In short, one may view the best information rule, as the ITC urges, as an investigative tool, which that agency may wield as an informal club over recalcitrant parties or persons whose failure to cooperate may work against their best interest. One may as well view the rule, in light of the legislative history cited, as a club over the *ITC's* head, which Congress has brandished to force that agency to arrive at *some* determination within the time allotted. "Impossible" is a word which Congress does not want to hear in these complex cases.

With this in mind, we address more closely Atlantic Sugar's contentions that the ITC staff acted negligently in not requesting plant-by-plant data from Revere until near the end of the investigatory period, especially when it was clear since the May 1979 preliminary ITC injury determination that the ITC would need northeastern regional industry data, excluding Chicago. Moreover, Atlantic Sugar stresses that Revere's questionnaire response, which the ITC received in early to mid-January 1980, showed that Revere's sales outside the northeastern region had decreased, on a percentage basis, far more than those within the region. This should have caused the ITC staff to suspect that Revere's Chicago plant was worse off than the Boston and Brooklyn plants, Atlantic contends, thus distorting and pulling downward the firm-wide statistics.[16] Finally, Atlantic argues that there was no reason why the ITC staff could not obtain such plant-by-plant data from Revere, when it could and did obtain it from the region's largest producer, Amstar.[17]

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[14] The Senate Report states that "a major objective of this revision of the antidumping duty law is to reduce the length of an investigation." *Id.*, S. REP. NO. 249 at 75, 1979 U.S. CODE CONG. & AD. NEWS at 461.

[15] Section 1333.

[16] At the time the ITC was gathering this data it expected it could use its traditional aggregation approach, rather than the piecemeal methodology mandated by the lower court in *Atlantic Sugar III*. *See* discussion in part 2 *infra*.

[17] Amstar apparently possessed a head start in this type of data segregation because it had filed for trade adjustment assistance, necessitating a somewhat similar proof of injury. Sections 2271 *et seq.*

While it may be true that the ITC staff might have been more aggressive in pursuing plant-by-plant data for Revere as it did with Amstar, we are not here reviewing the ITC's diligence. Nothing in the best information rule or its legislative history defines a standard of investigative thoroughness.[18] Rather, Atlantic Sugar's concerns go to the question of the evidence on the record for the injury determination, as discussed below. If that evidence is insubstantial, then the reviewing court must either reverse the ITC's determination or remand the case for further fact-finding. Implicit in such a reversal or remand would be the reviewing court's finding that some person or institution, whether the parties or ITC or all, inadequately collected and/or interpreted the data.

The lower court's analysis of the best information rule also bears further discussion. That court simply did not believe that Revere was "unable" to provide the Chicago plant data. It rejected Revere's position that such data was "not readily available," because (1) "it is reasonable to expect that a large corporation such as Revere would maintain record of the separate operations of its plants" and (2), since a separate region was found, "it is reasonable to expect that data reflecting this separation would be readily ascertainable from those who are producers in the region." [19]

These views, however, are founded neither in the record nor in business and accounting reality. Amstar, the region's largest sugar producer, did not keep all its data on a plant-by-plant basis, necessitating extensive work by the ITC staff in separating the information. There is no reason why Revere, the region's second largest producer, should have so segregated its data, especially that which would have been most useful to the ITC on a plant-by-plant basis, profit and loss figures. As the ITC points out, many corporations, while collecting cost data by plant, calculate revenue and hence profit only on a company-wide basis, particularly where company marketing, sales, administrative, and management expenses are centralized. Moreover, it is inflating out of all proportion the importance of the laws with which the lower court deals to expect that business people and corporate accountants would keep their books with an eye to an obscure and wholly arbitrary statutory geographic region, which a relatively small Government agency might declare for the purposes of one antidumping injury investigation.

The lower court nevertheless went on to hold: [20]

> [E]ven if Revere was unable or unwilling to provide the regional data [excluding its Chicago plant], the information used by the ITC still does not constitute proper evidence. It is not simply weaker evidence substituted for stronger evidence. It is

[18] *Cf.* discussion in *Haarman & Reimer Corp.* v. *United States*, 1 Ct. Int'l Trade 207, 209–10 (1981), and *Budd Co. Ry. Div.* v. *United States*, 507 F. Supp. 997, 1003–04 (Ct. Int'l Trade 1980), remanding to the ITC for further fact-finding.

[19] *Atlantic Sugar V*, 573 F. Supp. at 1145.

[20] *Id.*

> irrelevant and immaterial data substituting for evidence. *Its usefulness has been completely destroyed by the inclusion of the Chicago plant.* [Emphasis supplied.]

We see no basis for such an extreme conclusion. The lower court mentions the statutory regional industry provision, set forth above, as providing a "proscription against the use of data" from outside the region.[21] This is error, however, as that statute not only contains no such proscription but on its face stresses the need for intelligent approximations—*e.g.*, producers who "sell all or almost all of their production"; demand which is "not supplied, to any substantial degree"; producers of "all, or almost all, of the production." [22]

In short, by rejecting all the Revere data, and from there the entire injury determination, because of the inclusion of figures for the Chicago plant, the lower court has thrown the baby out with the bath water. This is not an application of the best information rule, but rather an evidentiary and factual determination which the lower court should have made according to the substantial evidence standard, discussed below. We therefore hold that the ITC acted in accordance with law by invoking the best information rule, and, to the extent that the lower court has held otherwise, we reverse.

2. *Substantial Evidence on the Record*

Substantial evidence on the record means "more than a mere scintilla" and "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," taking into account the entire record, including whatever fairly detracts from the substantiality of the evidence.[23] We therefore state the issue before us as whether the ITC's inclusion of the Revere Chicago plant data in its final affirmative determination of material injury to the United States sugar industry, defined to be a northeastern industry, by reason of dumped Canadian imports, so distorts or detracts from the evidence in favor of injury, as to render that evidence insubstantial on the record.

We note first the influence on this case of the methodology which the lower court declared to be required by law in a regional industry injury determination. In *Atlantic Sugar III* that court held that the statutory language "producers of all, or almost all, of the production within that [regional] market" [24] requires the ITC to examine each individual regional producer to determine if it is injured, exclude those that are not injured, and then examine those remaining to determine if they constitute "all, or almost all" of the

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[21] *Id.* at 1144, citing *Atlantic Sugar IV*, 553 F. Supp. at 1058.

[22] Section 1677(4)(C).

[23] *SSIH Equip. S.A.* v. *U.S. Int'l Trade Comm'n*, 718 F.2d 365, 382, 218 USPQ 678, 692 (Fed. Cir. 1983), additional comments of Judge Nies, quoting from *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477, 488 (1951).

[24] Section 1677(4)(C).

producers.[25] This piecemeal approach differs sharply from the aggregation method which the ITC has traditionally used in both nationwide and regional injury determinations. Nevertheless, the ITC, though disagreeing strongly with the lower court's view,[26] complied with it. Because the parties have not squarely raised this issue on appeal,[27] we analyze the injury determination within the "piecemeal" framework.

Since Revere produced approximately one-quarter of the sugar in the defined during the period in question, whether substantial evidence exists for injury to Revere is determinative of the ITC's affirmative finding, assuming the piecemeal framework discussed above.[28] Evidence of material injury on the record which evidence the ITC found regarding Revere includes: declining sugar production from 1978 to 1979, as well as declining capacity utilization, person-hours worked and productively, and profits (all including Chicago plant data); declining total sales by Revere plants within the region (excluding Chicago) to regional customers from 1978 to 1979; and consistent underselling by one or both of the Canadian producers, sometimes by substantial margins, from 1978 to 1980.[29]

Evidence on the record detracting from the substantiality of the above includes, most significantly, the possible distorting impact of the Chicago plant figures. This impact may be estimated in several ways. First, the record does show an approximate (business confidential) figure for Revere's Chicago plant production which figure, while not the "small" or "minor" quantity as the ITC and Revere's president have characterized it, is at least less than a third of the aggregate Revere production figures. Thus we may conclude that the Chicago plant is likely smaller than the averaged size of the two northeastern region Brooklyn and Boston plants.[30] Secondly, the sales data, which the ITC did request and Revere did supply on a segregated basis, show that the sales of Revere's Chicago plant declined significantly more than those of the two northeastern plants. Nevertheless, sales of the northeastern plants did decline notably, and in absolute terms about the same amount as the larger regional producer Amstar. Thus, while the Chicago plant may have suffered worse sales declines, the northeastern plants suffered as well. Atlantic Sugar urges that the sharper decline at the Chicago plant would account for most of Revere's aggregate

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[25] *Atlantic Sugar III*, 2 Ct. Int'l Trade at 300.

[26] *Sugars & Sirups from Canada*, USITC Investigation No. 731-TA-3 (final) (April 1982) (Additional Views on Regional Industry Analysis), *reprinted in* 47 Fed. Reg. 19,490 (May 5, 1982).

[27] *See* ITC brief at 16, note 15, specifically declining to raise this matter. Appellant Amstar has raised this issue of law in a footnote in its main brief and in its reply brief; appellee Atlantic Sugar has not raised it. It is unfortunate that the parties have not squarely appealed and briefed the issue, since our review of the statute and legislative history indicates no basis for the lower court's holding. *See* thorough discussion in commissioners' additional views, note 26 *supra*, and the lower court's retreat from the rigidity of its holding in *Atlantic Sugar IV*, 553 F. Supp. at 1059–60.

[28] *Atlantic Sugar V*, 573 F. Supp. at 1145. The parties do not contest the ITC's affirmative injury finding for Amstar, the region's largest producer, and two other smaller producers, nor its negative injury finding with regard to two small regional producers.

[29] *Sugars & Sirups from Canada*, note 26 *supra*.

[30] When analyzed under the ITC's traditional aggregation approach, rather than under the lower court's piecemeal approach, the Chicago plant represents a very small percentage of the region's total sugar production.

profit loss. This may be so to a disproportionate degree, but it is still reasonable to expect that the northeastern plants, with declining sales, experienced some declining profits as well. Finally, Atlantic Sugar urges that we reject the information about the Chicago plant provided by Revere's president in response to the ITC analyst's phone call. As reviewing court, we do not presume to weigh the credibility of those statements, but simply recognize their presence on the record as those reported of a businessman speaking generally about his business in both a hurried and self-serving context.

In sum, considering as we have, the entire record with its confidential *in camera* evidence, and the points detracting from the substantiality of the evidence for injury to Revere, both as discussed here and as detailed further in Atlantic's briefs, we cannot find that this leaves so little evidence on the record as to be less than a "mere scintilla" or less than that which "a reasonable mind might accept as adequate to support a conclusion." To the contrary, we find that the ITC's determination regarding material injury to Revere is quite reasonable and supported by substantial evidence on the record. Considering the compromise which the ITC must make between a perfectly accurate and an extremely rapid determination under this complex statute, the absence here of the most important missing figures—segregated profit and loss data for the second largest regional producer—is not so debilitating as to render the final determination unsupported under the substantial evidence standard.

We reverse the lower court's finding of insubstantial evidence on the record to support the final ITC material injury determination, reinstate that determination, and order that the resulting antidumping order be reinstated as well.

REVERSED

(Appeal No. 84-1497)

THEODORE QUINTIN, APPELLANT *v.* THE UNITED STATES, APPELLEE

Before BENNETT, MILLER, and SMITH, *Circuit Judges.*

ORDER

Appellee has moved to dismiss this appeal on the basis that the U.S. Court of International Trade (CIT) abused its discretion in granting the appellant (pro se) an extension of time for filing a notice of appeal. Rule 4(a)(1) of the Federal Rules of Appellate Procedure (FRAP) is made applicable to CIT appeals by Federal Circuit Rule 10(a) and requires that a notice of appeal must be filed within 60 days after entry of judgment where the United States or an officer or agency thereof is a party. See also 28 U.S.C. 2107

(1982). Here the judgment was entered on April 3, 1984, but appellant's letter indicating a desire to appeal was received by the CIT on June 6, 1984, plainly late, and rejected. The CIT Clerk, however, promptly provided appellant with helpful and accurate procedural information about applicable rules.

FRAP Rule 4(a)(5) permits a court to extend the time for filing a notice of appeal upon a showing of excusable neglect or good cause provided that the appellant seeks such an extension "not later than 30 days after the expiration of the time prescribed by Rule 4(a)." On June 29, 1984, appellant filed a timely motion under the rule for an extension of time to file an appeal. On July 12, 1984, the CIT issued an order granting the appellant 10 days from the date of the order to file the appeal. FRAP 4(a)(5). He timely filed on July 23, 1984. FRAP 26.

The issue raised by appellee's motion to dismiss this appeal is whether the CIT abused its discretion in granting an extension of time to appeal. The July 12, 1984, order of the court granting the extension does not give us much to go on. It does not mention what good cause is found or what excusable neglect. We can only conclude from the cryptic six-line order that the basis for the extension was the appellant's three arguments, eleven handwritten lines on one page, asserting as near as we can make it out: (1) a failure to be informed of the transcript costs, (2) receipt of notice of the judgment, entered on April 3, 1984, too late to file a timely notice of appeal, and (3) since the government had more than 30 days to file a brief appellant should have equal time.

It is unnecessary to belabor this matter. Close examination of all the papers before us on appeal makes it clear that appellant's unsupported contentions are either irrelevant or grossly contrary to fact. There is absolutely nothing that suggests any good cause or excusable neglect on appellant's part in not filing his notice of appeal in a timely manner in the first place. *See Case* v. *BASF Wyandotte,* 737 F.2d 1034 (Fed. Cir. 1984). On appeal we have had the benefit of the government's view of the facts and the applicable law. Had the CIT permitted appellee to respond to the motion for a time extension it too could have been apprised of these matters. Instead, without making any findings, and with no discussion, it perfunctorily granted a motion for more time, making notice of the appeal almost 50 days late and 111 days after the judgment was entered and served upon the parties. With all due respect, the CIT abused its discretion in this matter and in so doing rendered FRAP 4 a nullity.

IT IS THEREFORE ORDERED that the order of the Court of International Trade granting an extension of time in which to file

a notice of appeal is *reversed,* the motion of the appellee to dismiss the appeal is *granted,* and the appeal is *dismissed.*

For the Court.

MARION T. BENNETT,
Circuit Judge.

October 10, 1984, Washington, D.C.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
Morgan Ford
James L. Watson
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Jane A. Restani
Dominick L. DiCarlo

Senior Judges

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Clerk

Joseph E. Lombardi

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Decisions of the United States Court of International Trade

(Slip Op. 84-113)

R.E. ABBOTT, ET AL., PLAINTIFFS *v.* RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, DEFENDANT

Court No. 81-1-00028

Before: RE, *Chief Judge.*

ON PLAINTIFFS' MOTION FOR REVIEW OF ADMINISTRATIVE DETERMINATION UPON AGENCY RECORD

Plaintiffs, on behalf of former service workers at the Marion plant of the Dana Corporation, challenge the Secretary of Labor's denial of certification of eligibility for trade adjustment assistance benefits. Plaintiffs contend that the administrative record establishes the existence of an "important causal nexus" between increased imports of journal crosses and bearing races, and their separation from employment from the Dana Corporation, entitling them to adjustment assistance benefits.

HELD: Since the amount of service worker activity expended in support of the certified production departments was insufficient, plaintiffs did not establish an "important causal nexus" between increased imports and their separation from employment. Thus, the Secretary's denial of certification of eligibility for trade adjustment assistance benefits is supported by substantial evidence, and is in accordance with law.

[Judgment for defendant; action dismissed.]

(Decided October 11, 1984)

Bruce M. Frey, for the plaintiffs.

Richard K. Willard, Acting Assistant Attorney General. *David M. Cohen,* Director, Commercial Litigation Branch (*Sheila N. Ziff* on the brief), for the defendant.

RE, *Chief Judge:* Plaintiffs, on behalf of the former employees at the Dana Corporation's Marion, Indiana plant (Marion plant), challenge a determination of the Secretary of Labor denying certification of eligibility for trade adjustment assistance benefits under the Trade Act of 1974. 19 U.S.C. §§ 2101-2487 (1982).

The Secretary's denial is part of a multiple determination on the petition for certification filed by the Marion plant employees, in which only the employees in Departments 225 and 230, the departments that produced journal crosses and bearing races, were certified. *Abbott* v. *Donovan*, 6 CIT ——, 570 F. Supp. 41, 43, 44 (1983), (Abbott I), and *Abbott* v. *Donovan*, 7 CIT ——, Slip Op. 84-64 at 1, 2 (June 6, 1984), (*Abbott II*). The Secretary denied certification to the remaining production workers at the plant, and to the service workers, who provided ancillary and support services to the various production departments, because they failed to satisfy the requirements set out in section 222(3) of the Trade Act of 1974, 19 U.S.C. § 2272(3) (1982). *Abbott II* at 2. Having been twice remanded, this action is before the Court for the third time.

The background of this action is detailed in *Abbott I* and *Abbott II*, and need not be restated. After careful review in *Abbott I*, this Court affirmed the Secretary's determination denying certification to production workers other than those in Departments 225 and 230. The court agreed with the Secretary that "only those production workers in Departments 225 and 230 were adversely affected by increased imports of like or directly competitive articles, as contemplated by section 222(3) of the Act." 570 F. Supp. at 43.

In *Abbott I*, the Secretary found that increased imports did not "contribute importantly" to the service workers separation from employment. The court remanded to the Secretary that part of the action relating to the service workers because his determination had not been "supported by any substantial evidence." 570 F. Supp. at 51. In addition, the court noted that the imposition of the Secretary's 25% standard would only be valid if the activities of the service workers were evenly distributed throughout the plant, and provided that some production departments were not more "service intensive" than others. The Secretary was instructed to take these factors into account when making his redetermination.

Pursuant to the court's order in *Abbott I*, the Secretary conducted a further investigation of the service workers at the Marion plant, and submitted his redetermination to the court. The Secretary also submitted a supplemental administrative record. In his redetermination, once again, the Secretary concluded that increased imports did not contribute importantly to the service workers' separation from employment. 48 Fed. Reg. 48876, 48877 (1983).

The Secretary based this second denial of certification on new data which compared the relationship of hours worked by the employees of the twenty-five service departments to production Departments 225 and 230. The data revealed an uneven distribution of support services between Departments 225 and 230. The data, however, did not reveal the relationship of the service departments to the remaining production departments. Nor did the Secretary submit evidence showing that he considered the possibility that

some production departments could be more service intensive than others.

Thus, in *Abbott II,* the court concluded that the denial of certification was still not supported by substantial evidence, and the action was again remanded to the Secretary. The court instructed the Secretary to produce comparative data showing the relationship of the activities of the service workers in the various service departments to *all* production departments, to determine which production departments, if any, were more service intensive than others.

Pursuant to the court's order in *Abbott II,* the Secretary has filed his latest determination, which reaffirms the two prior determinations, denying certification of eligibility for trade adjustment assistance benefits to the service workers at the Marion plant. Plaintiffs again contest the Secretary's determination, contending that the administrative record establishes the existence of an "important casual nexus" between increased imports of journal crosses and bearing races, and their separation from employment.

This Court is empowered to review a decision by the Secretary of Labor which denies certification of eligibility for trade adjustment assistance benefits to assure that the Secretary's determination is in accordance with law, and is supported by substantial evidence in the administrative record. Trade Act of 1974, § 284, 19 U.S.C. § 2395(b) (1982). Legislative enactments are seldom, if ever, neutral. They either promote or foster certain activities, policies or goals, or discourage or frustrate others. The pertinent statute which governs this case, The Trade Act of 1974, is no exception. Although fully cognizant of the benefactory animating purpose of the legislation, the court must nevertheless give effect to the plain language of the statute.

Pursuant to section 222 of the Act, in order to certify plaintiffs as eligible for trade adjustment assistance benefits, the Secretary of Labor's investigation must disclose:

> (1) That a significant number or proportion of the workers in such workers' firms or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) That sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) That increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof *contributed importantly* to such total or partial separation, or threat thereof, and to such decline in sales or production.

19 U.S.C. § 2371(c) (emphasis added).

If any one of these three statutory conditions does not exist, the Secretary must deny certification.

Neither section 222, nor any other section of the adjustment assistance provisions of the Trade Act of 1974 expressly mentions service workers. The accompanying legislative history is similarly silent. Hence, the court must accord some deference to the interpretation of the statute by the agency charged with its administration *Woodrum* v. *Donovan,* 5 CIT ——, 564 F. Supp. 826, 829 (1983), *aff'd,* No. 84-651 (Fed. Cir. July 3, 1984) (quoting *Federal Election Commission* v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27, 31-32 (1981)).

After a careful review of the original and supplemental administrative records, the briefs of the parties, and the Secretary's analysis of the service workers' relationship with the production departments at the Marion plant, this Court holds that the Secretary's most recent determination, denying certification of eligibility for trade adjustment assistance benefits to the service workers, is supported by substantial evidence, and is in accordance with law.

The record reveals that the service workers who provided ancillary and support services to the certified departments were tool makers, tool and cutter grinders, laborers, millwrights, electricians, machine repairers, stock chasers (fork-lift drivers), salvage inspectors, oilers, metal lab technicians, central storekeepers, inspectors, quality control inspectors, garage mechanics, and those employed in the shipping department. The record further discloses that, of the twenty-five service departments at the Marion plant, the two highest levels of service activity to Departments 225 and 230 came from millwrights and electricians. Millwrights spent 3.9% and 6.6% of their job activity supporting Departments 225 and 230, respectively. The range of millwright activity in all production departments was 2.6% to 6.6%. Electricians spent 5.0% and 10.0% of their job activity in Departments 225 and 230, respectively. The range of electrician activity in all production departments was 2.5% to 10.0%.

In *Abbott I,* this Court stated that it would defer to the Secretary's interpretation of the statute as long as it had a "rational basis in law," was not "inconsistent with the legislative purpose of the statute," and did not frustrate Congressional intent. 570 F. Supp. at 49 (citing *John V. Carr & Son, Inc.* v. *United States,* 69 Cust. Ct. 78, 86, 347 F. Supp. 1390, 1396 (1972), *aff'd,* 61 CCPA 52, 496 F.2d 1225 (1974), and *Woodrum v. Donovan,* 5 CIT ——, 564 F. Supp. 826, 829 (1983), *aff'd,* No. 84-651 (Fed. Cir. July 3, 1984)). The Secretary has interpreted section 222(3) of the Trade Act of 1974 to authorize trade adjustment assistance benefits for service workers only if they can establish an important causal nexus between increased imports and their separation from employment. *Abbott I,* 570 F. Supp. at 49. A causal nexus is established when service workers can demonstrate that a "substantial amount" of their activities are directly related to the production of the import-impacted article. *Id.*

When we speak of an important causal nexus we essentially refer to the term "contributed importantly," the causation standard found in the Trade Act of 1974. Section 222 of the Act provides that "the term 'contributed importantly' means a cause which is important but not necessarily more important than any other cause." The relevant legislative history also reveals that Congress intended that "a cause . . . be significantly more than *de minimus* to have contributed importantly." S. Rep. No. 93–1298, 93rd Cong., 2d Sess. 133, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7186, 7275. Thus, as a threshhold substantial amount sufficient to establish an important causal nexus, the Secretary requires that at least 25% of the service workers activity be expended in service to the subdivision which produces the import-impacted article. *Id.* On this record the Court need not consider whether that standard is reasonable. The record clearly shows that the amount of service worker activity expended in support of certified departments at Dana Corporation was, in no instance, higher than 10%, a percentage which the Court agrees is insufficient for purposes of certification.

Since the data establishes that the percentage of service workers activity related to production at the Marion plant was not "significantly more than *de minimus,*" the Court holds that the Secretary's determination is both reasonable and consistent with the purpose of the Act. Unlike the data submitted in *Abbott II,* the court finds support for the Secretary's conclusion that the service workers did not, in the language of the statute, "contribute importantly" to the production of journal crosses and bearing races.

Therefore, it is the determination of the court that, as to the service workers who provide ancillary and support services to both certified and non-certified departments within the Marion plant, the Secretary's denial of certification of eligibility for trade adjustment assistance benefits is based on substantial evidence, and is in accordance with law. Accordingly, the Secretary's determination is affirmed, and the action is dismissed.

(Slip Op. 84–114)

CARIBINER, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 80–12–00148

Before FORD, *Judge.*

MEMORANDUM OPINION AND ORDER

(Decided October 12, 1984)

Whitman & Ransom (Max F. Schutzman) for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office *(Susan Handler-Menahem),* for the defendant.

FORD, *Judge:* This action, submitted to the Court on plaintiff's motion for summary judgment, involves the proper classification of certain audio-visual and related apparatus entered by the plaintiff at the port of New York.

Defendant contends there are disputed issues of fact and, hence, the action is not ripe for summary judgment. Alternatively, however, defendant has cross-moved for summary judgment as a matter of law on the first and second causes of action. Defendant further moved to dismiss the second cause of action for lack of jurisdiction.

The plaintiff, Caribiner, Inc., is a New York corporation whose business is producing and staging sales meetings for corporate clients. In order to accomplish this function, it utilizes a number of audio-visual and related apparatus, such as cameras, projectors, audio and video tape machines, etc.

In the case at bar plaintiff, in arranging for a sales meeting in Bermuda, shipped four containers listed as audio equipment and accessories to Bermuda and filed Customs Form 4455, a "Certificate of Registration", indicating this information. Upon return of the equipment approximately one month later, plaintiff filed Customs Form 3311, a "Declaration of Free Entry of Returned American Products And/Or Certificate of Exportation", indicating the return of four containers of audio visual equipment and accessories. Based upon the filing of the above forms, required by Customs Regulations, plaintiff contends the same merchandise is entitled to free entry under Item 810.20, Tariff Schedules of the United States, as "tools of trade".

At this point it is to be noted that the equipment involved was of both domestic and foreign origin. It is alleged that the equipment of foreign origin was purchased in the United States.

Defendant contends the matter is not ripe for summary judgment, inasmuch as plaintiff has failed to establish that the merchandise contained in the four containers which were exported to Bermuda is the same merchandise contained in the four containers involved in the entries covered by this action.

The law is well settled that summary judgment may not be granted if any genuine issue of fact exists between the litigants. *Golding Bros.* v. *United States,* 6 CIT ——, Slip Op. 83–89 (August 22, 1983); *Keuffel & Esser Co.* v. *United States,* 5 CIT ——, Slip Op. 83–27 (April 7, 1983); *S. S. Kresge Co.* v. *United States,* 77 Cust. Ct. 154, C.R.D. 76–6 (1976).

The burden of proof in establishing the lack of a triable issue is upon the moving party. *Symphonic Electronics Corp.* v. *United States,* 77 Cust. Ct. 147, C.R.D. 76–5; *Gimbel Bros. Inc.* v. *United States,* 73 Cust. Ct. 223, C.R.D. 74–8 (1974). This burden requires the moving party to clearly establish the lack of disputed facts.

In the case at bar, plaintiff has failed to establish that the merchandise exported was the same as the merchandise returned from Bermuda. The mere fact that Customs Forms 4455 and 3311 indi-

cated the four containers exported and returned contained audio equipment and accessories does not establish it was the same merchandise. Since there are triable issues of fact in dispute the matter is not ripe for summary judgment. Plaintiff's motion must, therefore, be denied.

It is unnecessary at this time for the Court to consider the alternative claims of plaintiff or defendant since these issues can be determined after trail.

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary be, and the same hereby is, denied; and it is further

ORDERED, that defendant's motions for summary judgment and dismissal be, and the same hereby are, denied; and it is further

ORDERED, that the parties shall notice this action for trial at the convenience of the Court and the parties.

(Slip Op. 84-115)

REPUBLIC STEEL CORPORATION, ET AL., PLAINTIFFS *v.* THE UNITED STATES, ET AL., DEFENDANTS, COMPANHIA SIDERURGICA PAULISTA ("COSIPA"), ET AL., AND BETHLEHEM STEEL CORPORATION, INTERVENORS

Court Nos. 84-5-00687, 84-7-00965

Before: RESTANI, *Judge.*

OPINION AND ORDER

[Defendants' motion to dismiss granted, plaintiffs' motion to consolidate denied.]

(Decided October 12, 1984)

Cravath, Swaine & Moore, (Joseph R. Sahid), for plaintiffs.

Richard K. Willard, Acting Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, *J. Kevin Horgan,* Civil Division, Department of Justice, for defendants.

Wald, Harkrader & Ross, (Jeffery W. Carr), for defendant-intervenors.

Stewart & Stewart (Eugene L. Stewart), for plaintiff-intervenors.

RESTANI, *Judge:* Plaintiffs in these cases seek judicial review pursuant to 19 U.S.C. §§ 1516a(a)(2) (A)(ii) and (B)(ii) (1982) of certain aspects of a final countervailing duty determination by the International Trade Administration ("ITA"). These cases are before the court on plaintiffs' motion to consolidate and defendants' motion to dismiss Court No. 84-5-00687.

On November 10, 1983, the United States Steel Corporation filed a petition with the ITA and with the United States International Trade Commission ("ITC"), seeking the imposition of countervailing duties against imports of certain flat rolled carbon steel products from Brazil. On February 3, 1984, following the ITA's initiation of

a countervailing duty investigation,[1] the ITA rendered preliminarily countervailing duty determinations, and ordered that a weighted average net subsidy margin of 27.42% *ad valorem* be posted for all entries of the subject product into the United States.[2] On April 18, 1984, the ITA rendered final countervailing duty determinations pursuant to 19 U.S.C. § 1671d(a) (1982). In those determinations, the ITA revised the weighted average net subsidy margin to 36.95% *ad valorem*, and instead of applying this figure equally to all imports, as it had in its preliminary determinations, required that security be posted at one of three different rates, depending upon which of three subsidiaries of the Brazilian state-owned steel company, Siderurgica Brasileira, S.A. ("Siderbras"), produced the particular shipment being entered.[3] Plaintiffs, in filing these suits, sought to challenge the ITA's decision to require the posting of "subsidiary-specific" security.

On May 25, 1984, plaintiffs commenced their first case involving the final affirmative countervailing duty determination.[4] On June 17, 1984, the ITA issued a countervailing duty order against the subject product.[5] On July 17, 1984, plaintiffs commenced a second case.[6] There are no substantive differences between the two cases. Both challenge the ITA's employ of subsidiary-specific rates. Plaintiff filed two suits merely to ensure the timeliness of its complaint.[7]

On July 17, 1984, plaintiffs moved to consolidate Court Nos. 84-5-00687 and 84-7-00965. On July 31, 1984, defendants moved to dismiss Court No. 84-5-00687 on the ground that it was untimely filed, having been filed before the ITA's issuance of the final countervailing duty order. Defendants simultaneously opposed the plaintiffs' consolidation motion arguing that Court No. 84-5-00687 should be dismissed as a premature appeal of an affirmative determination pursuant to § 1516a(a)(2)(B)(i). This court then requested the parties to file supplemental memoranda on the effect of the Court of Appeals recent decision in *Bethlehem Steel Corp.* v. *United States*, Appeal No. 84-714 (Fed. Cir. August 27, 1984), on the instant case.

Bethlehem Steel held that an ITA finding that a certain program was not a subsidy, while other subsidies were found, was not a final negative administrative determination but rather a negative aspect of an affirmative determination. As part of an affirmative determi-

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[1] The ITA initiated its countervailing duty investigation in this matter on December 8, 1983, notice of which appears at 48 Fed. Reg. 55012-13.

[2] The ITA's preliminary determinations were published at 49 Fed. Reg. 5157-5164 on February 10, 1984.

[3] The ITA's final determinations were published at 49 Fed. Reg. 17988-18000 on April 26, 1984.

[4] Court No. 84-05-00687.

[5] The ITA countervailing duty order was published at 49 Fed. Reg. 25655-56 on June 22, 1984.

[6] Court No. 84-07-00965.

[7] The pendency of the appeal in *Bethlehem Steel Corp.* v. *United States*, 6 CIT ——, 571 F.Supp. 1265 (1983) *reh. denied* (November 29, 1983), Appeal No. 84-714 (Fed. Cir. August 27, 1984) ("*Bethlehem Steel*") left open the question of the correct time period within which plaintiffs must challenge negative aspects of final affirmative countervailing duty determinations. Plaintiffs perceived that they might have been required to commence their action within thirty days of the final affirmative countervailing duty determination, or, on the other hand, within thirty days of publication of the countervailing duty order.

nation the nonsubsidy finding was reviewable within thirty days after the publication of the final countervailing duty order. *Id.* at 6; 19 U.S.C. § 1516a(a)(2)(A)(ii) and § 1516a(a)(2)(B)(i).

The instant action does not involve a determination regarding the existence of a subsidy but rather valuation of the subsidy after a finding that a subsidy existed. The *Bethlehem Steel* court, however, expressly characterized the underestimation of the magnitude of a subsidy as an "affirmative" finding. *Bethlehem Steel, supra* at 8. The court stated that when a plaintiff complains "that the ITA . . . underestimated the duties owed . . . an appeal would indisputably be from an affirmative determination and the time for appeal would indisputably be within 30 days after publication of the countervailing duty *order,* not the ITA's final administrative determination." *Bethlehem Steel, supra* at 8–9 (emphasis in original). Additionally, this court has held that the "valuation of a subsidy is a final affirmative determination that is contestable under section 1516(a) within thirty days after publication of a countervailing duty order." *Allegheny Ludlum Steel Corp.* v. *United States,* Slip Op. 84–16, at 13. (CIT March 24, 1984).

Although plaintiffs Republic Steel Corporation, Inland Steel Corporation and Jones & Laughlin Steel Corporation withdrew opposition to defendants' motion to dismiss the earlier appeal (Court No. 84–5–00687) after the *Bethlehem Steel* decision, plaintiff-intervenor Bethlehem Steel Corporation urges this court not to dismiss Court No. 84–5–00687, except as a matter of judicial economy.

This court is of the opinion that *Bethlehem Steel* does not leave room for early review in a case such as this. No irreversible harm has been alleged so there is no possible ground for failing to dismiss the early action. *See Bethlehem Steel* at 13. Furthermore, a countervailing duty order has now been issued so need for early filing can never be demonstrated in this action. *Cf. Bethlehem Steel, supra* at 9.

For the foregoing reasons, the motion to dismiss Court No. 84–5–00687 is granted and plaintiffs' motion to consolidate is denied as moot.

(Slip Op. 84–116)

JERNBERG FORGINGS CO., ET AL., PLAINTIFFS *v.* THE UNITED STATES, DEFENDANT

Court Nos. 83–12–01790, 84–1–00150

Before: RESTANI, *Judge.*

OPINION AND ORDER

[Defendant's motion to dismiss granted; plaintiffs' motion to consolidate denied.]

(Decided October 15, 1984)

Dow, Lohes & Albertson (William Silverman, James M. McElfish, Jr., and *John C. Jost),* for plaintiffs.

Richard K. Willard, Acting Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, *J. Kevin Horgan,* Civil Division, Department of Justice, for defendant.

RESTANI, *Judge:* This case presents a question of the proper time in which to seek review of a negative aspect of an affirmative administrative determination in light of the Federal Circuit's decision in *Bethlehem Steel* v. *United States,* Appeal No. 84–714 (Fed. Cir. August 27, 1984).

On April 29, 1983, plaintiffs filed a petition with the Department of Commerce ("Commerce") and the United States International Trade Commission ("ITC") seeking the imposition of countervailing duties upon Italian imports of forged undercarriage components pursuant to section 516A(a)(2) of the Tariff Act of 1930 ("Act"), as amended, 19 U.S.C. § 1516a(a)(2) (1982). In the petition plaintiffs and three other petitioners alleged that producers of the subject products in Italy benefited from numerous subsidies.

Finding the petition sufficient, Commerce initiated a countervailing duty investigation. 48 Fed. Reg. 23,288 (1983). On June 6, 1983, the ITC found a reasonable indication that imports of semifinished forged undercarriage links and rollers from Italy were materially injuring a United States industry but also found no reasonable indication that semifinished forged undercarriage segments, finished forged undercarriage links, rollers, rollers and segments, and forged undercarriage links and rollers were materially injuring a United States industry. 48 Fed. Reg. 28,564 (1983). On August 24, 1983, Commerce preliminarily determined that the sole producer of the subject products, Industria Meccanica e Stampaggio, S.p.d. ("I.M.E.S.") was receiving certain benefits constituting subsidies within the meaning of the Act. 48 Fed. Reg. 39,273 (1983). Commerce estimated the *ad valorem* amount of net subsidy at 1.02 percent. *Id.* A final countervailing duty determination was published November 16, 1983, in which the net subsidy was assessed at 1.37 percent on an *ad valorem* basis. 48 Fed. Reg. 52,111 (1983). On December 12, 1983, the ITC determined that United States industries were materially injured by the Italian products that were found by Commerce to have been subsidized. 48 Fed. Reg. 57,383 (1983).

On December 16, 1983, plaintiffs filed a summons in this court (Court No. 83–12–01790) seeking judicial review of the determinations published on December 12, 1983. Plaintiffs alleged that Commerce erred in ruling that a subsidy to I.M.E.S. in the form of a preferential export credit financing scheme was beyond the scope of Commerce's investigation. Plaintiffs then charged that Commerce incorrectly countervailed a preferential steel price subsidy at zero percent.

Precisely one month after Commerce published its final countervailing duty order on December 27, 1983, plaintiff filed a second action (Court No. 84-1-00150) in this court on January 27, 1983. The second complaint was substantially similar to the first complaint. Both complaints made identical allegations and sought the same relief.

Plaintiff has moved to consolidate its two actions and defendant has moved to sever and dismiss the earlier action as untimely basing its reasoning on *Bethlehem Steel, supra.*

In *Bethlem Steel,* the Court of Appeals held that an administrative finding that a certain program was not a subsidy, while other subsidies were found, was not a final negative determination but rather a negative aspect of an affirmative determination. As part of an affirmative determination the nonsubsidy finding was reviewable thirty days after the publication of the final countervailing duty order. Therefore, the court found that a complaint challenging such negative aspects was not filed later than permissible. *Bethlehem Steel, supra* at 6; 19 U.S.C. § 1516a(a)(2)(A)(ii) and § 1516a(a)(2)(B)(i). Although the *Bethlehem Steel* court did not foreclose early review of either nonsubsidy findings or of the valuation of subsidies, it did state that early review would be available only in cases where irreparable harm could occur before a final countervailing duty order issued. *Bethlehem Steel, supra* at 13. *See also Republic Steel Corp.* v. *United States,* 7 CIT ——, Slip Op. 84-115 (Oct. 12, 1984).

In the instant case plaintiffs do not allege even the slightest possibility of irreparable harm. Plaintiffs note that the earlier action was filed because of a confusion regarding the proper time to appeal. Neither the complaint nor any other pleading even speaks of possible harm.

Accordingly, the defendant's motion to dismiss the earlier complaint (Court No. 83-12-01790) is granted and therefore, plaintiffs' motion to consolidate is denied as moot.

(Slip Op. 84-117)

THE UNITED STATES, PLAINTIFF *v.* GOLD MOUNTAIN COFFEE, LTD., ET AL., DEFENDANTS

Court No. 84-6-00858

Before: RESTANI, *Judge.*

OPINION AND ORDER

[Defendants' motion to quash plaintiff's amended warrant for arrest of property is granted.]

(Decided October 16, 1984)

Richard K. Willard, Acting Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, *Kevin C. Kennedy,* Civil Division, Department of Justice, for plaintiff.

Barnes, Richardson & Colburn (*Andrew P. Vance, Michael A. Johnson, John J. Galvin* and *Carl J. Laurino, Jr.*), for defendants.

RESTANI, *Judge:* Plaintiff filed a cause of action under 18 U.S.C. § 545 (1982) and § 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (1982), alleging that defendants improperly labeled coffee imported from Indonesia as coming from China. Plaintiff seeks both a penalty equal to the value of the improperly labeled coffee (alleged to be $4,961,673) and a forfeiture of the goods.

This case is before the court on defendants' motion to quash plaintiff's amended warrant for arrest of property. Previous to issuance of the arrest warrant, the Customs Service and defendants entered into a constructive seizure agreement governing control of the coffee beans.

Plaintiff obtained the warrant for arrest of the coffee beans pursuant to 28 U.S.C. § 2461(b) (1982), which authorizes use of admiralty procedures for seizure of goods in nonadmiralty forfeiture actions when appropriate procedures are not otherwise provided for by an Act of Congress.[1]

In admiralty, issuance of an arrest warrant by the clerk of the district court is the correct method of seizing goods so that an *in rem* forfeiture action may proceed. Rule C(3) of the Supplemental Rules for Certain Admiralty and Maritime Claims. In order to decide whether § 2461(b) and, consequently, Rule C(3) apply to this action, their application must be analyzed both in the context of § 545 actions and in the context of § 592 actions.

Section 545 generally provides for forfeiture of goods smuggled into the United States in violation of that section.[2] Forfeiture of goods is not an automatic part of a § 545 criminal conviction. *United States* v. *Brigance,* 472 F. Supp. 1177, 1181 (S.D. Tex. 1979). Rather, obtaining a § 545 forfeiture requires separate civil *in rem* proceedings. *Id.*

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[1] 28 U.S.C. § 2461(b) provides in relevant part:

Unless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress . . . forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty.

[2] 18 U.S.C. § 545 provides in relevant part:

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

Plaintiff asserts that this court has ancillary jurisdiction over a § 545 forfeiture action when it is brought in conjunction with a § 592 penalty proceeding.

The United States Court of International Trade, like all Federal courts established under Article III of the Constitution, is a court of limited jurisdiction. *United States* v. *Biehl & Co.*, 3 CIT 158, 162, 539 F. Supp. 1218, 1221 (1981). Once jurisdiction is challenged, plaintiff has the burden of proving that jurisdiction in this court is proper. *Id.* at 160, 539 F. Supp. at 1220.

Jurisdiction over forfeiture actions lies generally with the district courts. 28 U.S.C. § 1355 (1982).[3] However, the district court's jurisdiction in these actions does not include matters within the jurisdiction of this court under 28 U.S.C. § 1582 (1982). *Id.* Section 1582 grants exclusive jurisdiction to this Court of "any civil action which arises out of an import transaction and which is commenced by the United States—to recover a civil penalty under section 592 . . . of the Tariff Act of 1930. . . ." Plaintiff argues that since the § 545 action in this case arises out of the same transaction alleged in the § 592 action, "common sense" dictates that this court apply the doctrine of ancillary jurisdiction to hear the § 545 claim.

As plaintiff correctly points out, ancillary jurisdiction should attach when four conditions are satisfied: (1) the ancillary matter arises from the same transaction that is the basis of the main proceeding, or arises during the course of the main matter, or is an integral part of the main matter; (2) the ancillary matter can be determined without a substantial new fact finding proceeding; (3) determination of the ancillary matter will not deprive a party of a substantial procedural or substantive right; and (4) the ancillary matter must be resolved to protect the integrity of the main proceeding or to insure that disposition of the main proceeding will not be frustrated. *Morrow* v. *District of Columbia,* 417 F.2d 728, 740 (D.C. Cir. 1969); *Dillon* v. *Berg,* 347 F.Supp. 517, 519 (D. Del. 1972).

Although it may be appropriate in some instances for this court to exercise ancillary jurisdiction, the court will not exercise those powers here. First, the concept of federal ancillary jurisdiction, which developed where state court causes of action were involved, should be applied carefully when a conflict involving purely federal jurisdiction is concerned. *See, e.g., Atl, Inc.* v. *United States,* 4 Cl. Ct. 672, 676 (1984), *aff'd,* 735 F.2d 1343 (Fed. Cir. 1984), *citing United States* v. *King,* 395 U.S. 1, 3 (1969); *Freese* v. *United States,* 221 Ct. Cl. 963, 964–65 (1979) (both cases finding no ancillary jurisdiction).[4] The court must not upset the jurisdictional scheme

[3] 28 U.S.C. § 1355 provides:
The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

[4] In *Marine Transport Lines, Inc.* v. *United States,* 139 F. Supp. 301 (Ct. Cl.), *decision set aside on other grounds,* 146 F. Supp. 222 (Ct. Cl.), *cert. denied,* 352 U.S. 935 (1956), the Court of Claims did assert ancillary jurisdiction over certain admiralty claims, because in that case the court perceived a necessity to resolve those claims in order to exercise its own jurisdiction properly. The Court of Claims later found no jurisdiction over any of the causes of action asserted and dismissed the case.

among the federal courts, over which Congress has full control. This is especially true in this case, where Congress has had a recent opportunity to review the jurisdiction of this court and did not give it jurisdiction over § 545 *in rem* forfeiture actions. 28 U.S.C. § 1582; *see also* S. Rep. No. 778, 95th Cong., 2nd Sess. 19, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2211, 2230 (discussing § 592).

Second, although the actions are closely related, this court can fully and effectively dispose of the § 592 penalty action without considering all of the issues involved in a parallel § 545 proceeding.[5] Resolution of the § 545 claim need not be resolved to protect the integrity of the § 592 proceeding or "to insure that disposition of the [§ 592] proceeding will not be frustrated." [6] In the absence of such necessity, convenience to a party, efficient use of judicial resources, or even one party's judgment as to what constitutes "common sense" [7] is not sufficient ground to exercise this court's potential ancillary jurisdiction. Hence, none of these factors suffices to meet plaintiff's burden in establishing jurisdiction in this court of the § 545 claim asserted here.

While plaintiff may be free to pursue a § 545 action in district court and to obtain an arrest warrant pursuant to § 2461(b) in that court, this court has no jurisdiction over the § 545 claim asserted here (*see* 28 U.S.C. § 1582); therefore, an arrest warrant may not be issued pursuant to that section in this court. Consequently, all references to 18 U.S.C. § 545 are stricken from the complaint and the propriety of the government's arrest of the coffee beans must be evaluated under its second cause of action, that set forth in 19 U.S.C. § 1592.

Plaintiff argues that because § 1592(c)(5) does not require the return of restricted goods that are seized, forfeiture of such goods is authorized under § 1592, apart from any monetary penalty.[8] Plain-

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[5] There is an open question of whether a conviction of some person, not necessarily the owner of the goods, must occur before a forfeiture under § 545 is proper. *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 234 n. 3 (1972). Even if conviction is not necessary, and even if a decision here has some collateral estoppel effect on a parallel § 545 case, the final requirement for ancillary jurisdiction is missing in this case. The court notes that it seems likely that conviction would not be required in a case of dangerous (or illegal per se) merchandise. That situation is not before us, and the court does not decide whether ancillary jurisdiction of a § 545 cause of action would be appropriate in such a case.

[6] See discussion of potential remedies under § 592 in the following section of this opinion.

[7] Plaintiff quotes Wright and Miller's discussion of federal ancillary jurisdiction over certain state court actions in suport of its contention that common sense dictates the exercise of ancillary jurisdiction in this case:

> Ancillary jurisdiction exists because without it the federal court neither could dispose of the principal case effectively nor do complete justice in the dispute that is before the tribunal. *Viewed from this perspective* then, the concept is a common-sense solution to the problems of piecemeal litigation that otherwise would arise by virtue of the limited jurisdiction of the federal courts prescribed in Article III and the complexity of many modern lawsuits.

13 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3523 (1975) (footnotes omitted) (emphasis added).

Wright and Miller state that ancillary jurisdiction is appropriate (and satisfies common sense) when it is necessary, not that it is appropriate whenever it satisfies common sense.

[8] Section 1592(c)(5) provides in part:

> After seizure of merchandise under this subsection, the Secretary may, in the case of restricted merchandise, and shall, in the case of other merchandise (other than prohibited merchandise), return such merchandise upon the deposit of security not to exceed the maximum monetary penalty which may be assessed under subsection (c) of this section.

tiff would expand the language of § 1592 governing interim remedies into a permanent forfeiture in every § 1592 case involving restricted merchandise, whether fraud is involved or not. Congress' intent to remove the general *in rem* forfeiture provisions of the former § 592 is made clear in S. Rep. No. 778, 1978 U.S. Code Cong. & Ad. News at 2230, which states:

> The penalty for violation of section 592 would be changed from an in rem penalty, forfeiture of merchandise, to an in personam penalty, a monetary liability of the importer. . . . The seized merchandise would, in general, be forfeited to the United States only if the monetary penalty is not paid.

It seems that there is some room for forfeiture under § 1592, but not as an ordinary remedy in addition to penalties. "[U]pon assessment of a monetary penalty, [seized property may be] forfeited unless the monetary penalty is paid within the time specified by law." 19 U.S.C. § 1592(c)(5). Forfeiture also might be necessary to prevent dangerous or totally prohibited merchandise (not involved here) from entering into the commerce of the United States. But contrary to plaintiff's assertion, forfeiture is not the only means of preventing restricted merchandise from entering the United States in violation of the customs laws. The restricted goods might be excluded and the owner ordered to remove them from the territory of the United States. Alternatively, the merchandise might be sold for foreign consumption and the net proceeds applied against penalties.[9] Neither of these remedies is best effected through an *in rem* proceeding.[10] Furthermore, it is inappropriate to imply a requirement of *in rem* forfeiture where Congress, to the contrary, has indicated its intent that *in rem* forfeiture be replaced under § 1592. In addition, *in rem* arrest procedures are not necessary as a protective measure here because there is no threat of restricted or prohibited merchandise entering domestic commerce pending this determination. (Note the constructive seizure agreement). In summary, it is clear in this case that an *in rem* proceeding is not appropriate because *in personam* jurisdiction to effect appropriate relief exists.

Quite apart from the question of the propriety of *in rem* forfeiture proceedings under § 1592, it is clear that no compliance with § 1592(c)(5) has been shown. Section 1592(c)(5) sets forth specific conditions under which the Secretary of the Treasury ("Secretary") may seize merchandise as security for payment of a monetary penalty for fraud or negligence. Such seizure is proper only when the Secretary has reasonable cause to believe that a person has violated § 1592(a) and that (1) the person is insolvent, (2) the person is

[9] Congress did not specifically provide for such remedies in § 1592, but considering the customs laws as a whole, it must have intended that such remedies would be available. The court may fill such interstices in the law in accordance with Congressional intent. *Asahi Chemical Industry, Ltd.* v. *United States*, 4 CIT 120, 124, 548 F. Supp. 1261, 1265 (1982).

The court need not decide at this juncture whether one of these remedies, or another equitable remedy, would be appropriate to effectuate the provisions of § 1592 and other customs laws.

[10] Contrast the necessity for *in rem* proceedings in admiralty foreclosures cases to which Rule C (discussed *supra*) specifically applies.

beyond the jurisdiction of the United States, (3) seizure is otherwise essential to protect the revenue of the United States, or (4) seizure will prevent the introduction into domestic commerce of prohibited or restricted merchandise.

It is clear that a general provision such as § 2461(b) cannot be used to defeat the purpose of the detailed requirements of § 1592. *See Busic* v. *United States,* 446 U.S. 398, 406 (1980). There has been no showing that the conditions of § 1592(c)(5) were satisfied during the process of obtaining the arrest warrant. In fact, plaintiff did not attempt to make such a showing. Obviously in enacting § 1592(c)(5) Congress was attempting to protect potential property rights of parties such as defendants here, and Congress may have perceived a possible Constitutional reason for requiring findings such as those set forth in § 1592 prior to seizure. *See generally Sniadach* v. *Family Finance Corp.,* 395 U.S. 337, 339, (1969); *Fuentes* v. *Shevin,* 407 U.S. 67, 90–92 (1972). In any case, the statutory requirements of § 1592 cannot be circumvented by resorting to § 2461(b).

Furthermore, the clerk did not purport to, nor is he empowered to make the judgments required under § 1592(c)(5).[11] Consequently, because of the special features of § 1592, goods to be forfeited *in rem* cannot become subject to the process of the court by action of the clerk alone, but only by action of the court in an appropriate case. Accordingly, defendants' motion to quash plaintiff's amended warrant for arrest of the coffee beans is granted.

[11] If the Secretary's self-help measures as set forth in § 1592(c)(5) are thwarted, there is no bar to the use of Rules 64 and 65 of this court to enforce pre-judgment remedies. The only requirement is that all procedures must be consistent with § 1592.

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decisions are not of sufficient general interest to print in
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DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED
				Item No. and Rat
P84/303	Rao, J. October 11, 1984	Corning Glass Works	81-8-01094	Item 523.91 7.5%

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DEPARTMENT OF THE TREASURY, *October 16, 1984.*

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t in full, the summary herein given will be of assistance
g important facts.

WILLIAM VON RAAB,
Commissioner of Customs.

SED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
nd Rate	Item No. and Rate		
1	Item 422.80 5%	Agreed statement of facts	New Orleans Baddeleyite

P84/304	Rao, J. October 11, 1984	Itel Corp.	81-10-01481	Various tariff items and rate
P84/305	Watson, J. October 15, 1984	Ashland Chemical Co.	79-8-01284	Item 403.80 1.7 per lb. plus 12.5%
P84/306	Newman, S.J. October 15, 1984	NEC Electronics, U.S.A., Inc.	83-3-00436	Item 685.90 7.3%

ariff nd rates	Item 800.00 Free of duty	Agreed statement of facts	San Francisco Computer parts; products of the U.S. returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means while abroad
0 lb. plus	Merchandise dutiable upon basis of compound rate of duty and plaintiff is entitled to refunds determined by formula in stipulated judgment	Agreed statement of facts	Buffalo Chlorendic acid
0	Item 687.85 4.24%	U.S. v. Kyocera, 681 F.2d 797 (1982)	San Francisco Lead frames

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DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION
R84/400	Rao, J. October 11, 1984	Ingersoll-Rand Co.	83-4-00518	Transaction value
R84/401	Re, C.J. October 15, 1984	Seaway Importing Co.	75-3-00599	Export value

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ON	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
lue	Said values are equal to invoiced unit values shown on entry papers	Agreed statement of facts	New York Not stated
	Appraised values specified on entry papers by liquidating officer less any additions included to reflect currency revaluation	C.B.S. Imports v. U.S. (C.D. 4739)	San Francisco Not stated

United States Court of International Trade

Amendments to Rules 1, 4, 5, 6, 7, 11, 12, 16, 23, 24, 26, 29, 30, 33, 36, 37, 38, 41, 43, 52, 53, 56, 56.1, 58, 59, 60, 62, 67, 74, 79, 81, 82, 83, 85, 86, and Form 5

New Rules 68, 87, 88, and 89
New Forms 14 and 15

OCTOBER 3, 1984

Effective Date:

January 1, 1985

Rules of the United States Court of International Trade

EFFECTIVE NOVEMBER 1, 1980, AS AMENDED TO JANUARY 1, 1985

I. SCOPE OF RULES—ONE FORM OF ACTION

Amendments to Rule 1

Rule 1 would be amended as follows:

Rule 1. Scope [~~and Effective Date~~] of Rules

[~~(a) *Scope.*~~] These rules govern the procedure in the United States Court of International Trade. They shall be construed to secure the just, speedy, and inexpensive determination of every action. When a procedural question arises which is not covered by these rules, the court may prescribe the procedure to be followed in any manner not inconsistent with these rules. The court may refer for guidance to the rules of other courts. The rules shall not be construed to extend or limit the jurisdiction of the court.

[~~(b) *Effective Date.* These rules shall take effect on November 1, 1980, the effective date of the Customs Courts Act of 1980. They govern all proceedings in actions commenced thereafter and then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work an injustice, in which event the former procedure applies. However, when a party is required or has been requested prior to the effective date of these rules to perform an act, pursuant to the rules of the United States Customs Court in effect prior to the effective date of these rules, the act may still be performed in accordance with the rules in effect prior to the effective date of these rules.~~]

(As amended, eff. Jan. 1, 1985.)

Amendments to Rule 4

Rule 4 would be amended as follows:

Rule 4. Service of Summons and Complaint

(a) *Summons—Service by the Clerk.* * * *

(1) * * *

(2) * * *

(3) * * *

(4) * * *

(5) * * *

(b) *Summons and Complaint—Service by Plaintiff.* In any action required to be commenced by the concurrent filing of a summons and complaint, the plaintiff shall cause service of the summons and compliant to be made [~~by a person described in subdivision (c) of this rule by the method prescribed in subdivision (d) or (h) of this rule~~] **in accordance with this rule.**

(c) [~~*Summons and Complaint—By Whom Served.* Service of the summons and complaint shall be made by a United States marshal, by his deputy, or by some person authorized by the law of the state or place in which service is made to make service of summons or other like process in an action brought in the courts of general jurisdiction of that state or place.~~]

(c) *Service.*

(1)(A) A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served by any person who is not a party and is not less than 18 years of age.

(B) A summons and complaint shall, at the request of the party seeking service or such party's attorney, be served by a United States marshal or deputy United States marshal, or by a person specially appointed by the court for that purpose, only—

(i) on behalf of a party authorized to proceed in forma pauperis pursuant to 28 U.S.C. § 1915,

(ii) on behalf of the United States or an officer or agency of the United States, or

(iii) pursuant to an order issued by the court stating that a United States marshal or deputy United States marshal, or a person specially appointed for that purpose, is required to serve the summons and complaint in order that service be properly effected in that particular action.

(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule—

(i) pursuant to the law of the State in which service is made for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or

(ii) by mailing a copy of the summons and complaint by first-class mail, postage prepaid, to the person to be served, together with two copies of a notice and acknowledgment which shall be substantially in the form set forth in Form 14 of the Appendix of Forms and a return envelope, postage

prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

(D) Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons and complaint.

(E) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.

(2) The court shall freely make special appointments to serve summonses and complaints under paragraph (1)(B) of this subdivision of this rule.

(d) *Summons and Complaint*—**[**~~*Service Generally.*~~**]** ***Person to Be Served.*** * * *

(1) Upon an individual **other than an infant or an incompetent person,** by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and the complaint to an agent authorized by appointment or by law to receive service.

(2) * * *

(3) * * *

(4) Upon the United States, by serving the Attorney General of the United States, by delivering or by mailing **by registered or certified mail, return receipt requested,** a copy of the summons and complaint to the Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Department of Justice.

(5) Upon an officer or agency of the United States, by serving the United States, and by delivering or by mailing **by registered or certified mail, return receipt requested,** a copy of the summons and complaint to such officer or agency. If the agency is a corporation, the copy shall be delivered as provided in paragraph (3) of this subdivision (d).

(6) * * *

[~~(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision (d), it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state or place in which service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state or place.~~**]**

(e) *Return.* **[**~~The plaintiff shall be responsible for filing proof of service of the summons and complaint with the clerk either at the time the summons and complaint are filed or immediately after service is made. If service is made by a person other than a United States marshal or his deputy, the person shall make affidavit thereof. Failure to make proof of service does not affect the validity of~~

~~the service.~~] **The person serving the process shall make proof of service thereof to the clerk of the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or deputy United States marshal, such person shall make affidavit thereof. If service is made under subdivision (c)(1)(C)(ii) of this rule, return shall be made by the sender's filing with the clerk of the court the acknowledgment received pursuant to such subdivision. Failure to make proof of service does not affect the validity of the service.**

(f) *Amendment of Proof of Service.* * * *

~~[(g) Service by Mail. When service of a summons and complaint by the plaintiff is made by mail, the mailing shall be by registered or certified mail, return receipt requested.~~]

[~~(h)~~] (g) *Alternative Provisions for Service in a Foreign Country.*

(1) Manner. Whenever a statute of the United States or an order of court thereunder provides for service of a summons and complaint, or of a notice, or of an order in lieu of a summons and complaint, upon a party not an inhabitant of or found within the United States, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service and service is to be effected upon a party in a foreign country, it is sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by deliverly to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched **by the clerk of the court** to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of this court or by the foreign court.

(2) Return. Proof of service may be made as prescribed by subdivision (e) of this rule, or by the law of the foreign country, or by order of this court. When service is made pursuant to paragraph (1)(D) of this subdivision [~~(h)~~] (g), proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to this court.

(h) ***Summons and Complaint—Time Limit for Service.*** **If a service of the summons and complaint is not made upon a defendant within 120 days after the action is commenced and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon**

motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (g) of this rule.

[~~PRACTICE COMMENT: Registered or certified mail, return receipt requested, shall be used, as specified in Rule 4(g), when service of a summons and complaint by plaintiff is made by mail.~~**]**

PRACTICE COMMENT: * * *

PRACTICE COMMENT: The notice and acknowledgement of service as prescribed by Rule 4(c)(1)(C)(ii) shall be substantially in the form set forth in Form 14 of the Appendix of Forms.

(As amended, eff. Jan. 1, 1985.)

Amendments to Rule 5

Rule 5 would be amended as follows:

Rule 5. Service and Filing of Pleadings and Other Papers

(a) *Service—When Required.* * * *

(b) *Service—How Made.* * * *

(c) *Service—Numerous Defendants.* * * *

(d) *Filing—When Required.* * * *

(e) *Filing—How Made.* * * *

(f) *Filing of Summons and Complaint by Mail.* * * *

(g) *Service and Filing—When Completed.* * * *

(h) *Proof of Service.* * * *

PRACTICE COMMENT: * * *

PRACTICE COMMENT: * * *

PRACTICE COMMENT: When service is to be made upon a party represented by an attorney, service shall be made upon the attorney of record, unless otherwise ordered by the court.

PRACTICE COMMENT: When proof of service is made in the form of a statement, as prescribed in Rule 5(h), and the person served is an attorney, the statement shall identify the name of the party represented by the attorney served.

(As amended, eff. Jan. 1, 1985.)

Amendment to Rule 6

Rule 6 would be amended as follows:

Rule 6. Time

(a) *Computation.* * * *

(b) *Extension.*

(1) When by these rules or by a notice given thereunder or by order of the court, an act is required or allowed to be done at or within a specified time, the court may upon motion, for good cause shown, order the period extended; **but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.**

(2) * * *

(3) * * *

(4) * * *

(c) *Additional Time After Service by Mail.* * * *

(As amended, eff. Jan. 1, 1985.)

Amendments to Rule 7

Rule 7 would be amended as follows:

Rule 7. Pleadings Allowed—Consultation—Oral Argument—Response Time—Show Cause Order—Form of Motions

(a) *Pleadings.* * * *

(b) *Motions—Consultation.* * * *

(c) *Oral Argument.* * * *

(d) *Time To Respond.* * * *

(e) *Order To Show Cause.* * * *

(f) *Form of Motions and Other Papers.* [~~An application to the court for an order shall be by motion, properly designated, which, unless made during a hearing or trial, shall be in writing and shall state, with particularity, the grounds therefor. Motions which require consultation between counsel before being made as prescribed by subdivision (b) of this rule, shall describe the reasonable effort made to reach agreement on the issues involved in the motion through consultation with opposing counsel, without the intervention of the court, and shall also recite the date and time of such consultation, as well as the names of all persons participating. All motions shall set forth the relief or order sought, and shall be accompanied by a proposed order. The rules applicable to the captions, signing, and other matters of form of pleadings apply to all motions and other papers prescribed by these rules.~~]

(1) An application to the court for an order shall be by motion, properly designated, which, unless made during a hearing or trial, shall be in writing and shall state, with particularity, the grounds therefor. Motions which require consultation between counsel before being made as prescribed by subdivision (b) of this rule shall describe the reasonable effort made to reach agreement on the issues involved in the motion through consultation with opposing counsel, without the intervention of the court, and shall also recite the date and time of such consultation, as well as the names of all persons participating. All motions shall set forth the relief or order sought, and shall be accompanied by a proposed order.

(2) The rules applicable to the captions, signing, and other matters of form of pleadings apply to all motions and other papers prescribed by these rules.

(3) All motions shall be signed in accordance with Rule 11.

(g) *Dispositive Motions Defined.* Dispositive motions include: motions for judgment on the pleadings; motions for summary judgment; motions for judgment upon an agency record; motions to dismiss an action; and any other motion for a final determination of an action.

PRACTICE COMMENT: * * *

(As amended, eff. Jan. 1, 1985.)

Amendments to Rule 11

Rule 11 would be amended as follows:

Rule 11. [~~Signing of Pleadings or Other Papers~~] **Signing of Pleadings, Motions and Other Papers—Sanctions**

Every pleading [~~or~~] **, motion, and** other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address and telephone number shall be stated. Every pleading [~~or~~] **, motion, and** other paper of the United States shall be signed by an attorney authorized to do so on behalf of the Assistant Attorney General, Civil Division, Department of Justice. A pleading, **motion,** or other paper of an agency of the United States, authorized by statute to represent itself in judicial proceedings, may be signed by an attorney authorized to do so on behalf of the agency. A party who is not represented by an attorney shall sign his pleading, **motion,** or other paper and state his address and telephone number. Except when otherwise specifically prescribed by rule or statute, pleadings or other papers need not be verified or accompanied by affidavit. The signature of an attorney **or party** constitutes a certificate by him that he has read the pleading, **motion,** or other paper; that to the best of his knowledge, information, and belief [~~there is good ground to support it; and that it is not interposed for delay~~] **formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.** [~~If a pleading or other paper is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading or other paper had not been served. For a wilful violation of this rule, an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.~~] **If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.**

[~~When these rules require that a pleading or other paper be accompanied by affidavit or certificate of the person signing, it is sufficient if the pleading or other paper (other than a deposition, or an oath required to be taken before a specified official other than a notary public) is subscribed to as true under penalty of perjury in substantially the following form:~~

~~"I affirm, under the penalties of perjury, that the foregoing is true and correct.~~

~~Signature~~

~~Type Name~~ ~~Date"~~]

(As amended, eff. Jan. 1, 1985.)

Amendment to Rule 12

Rule 12 would be amended as follows:

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings

(a) *When Presented.* * * *

(b) *How Presented.* * * *

(c) *Motion for Judgment on the Pleadings.* * * *

(d) *Preliminary Hearings.* * * *

(e) *Motion for More Definite Statement.* If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading[s]. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) *Motion To Strike.* * * *

(g) *Consolidation of Defenses in Motion.* * * *

(h) *Waiver or Preservation of Certain Defenses.*

(1) * * *

(2) * * *

(3) * * *

(As amended, eff. Jan. 1, 1985.)

Amendments to Rule 16

Rule 16 would be amended as follows:

Rule 16. [~~Pre-Trial Procedure—Formulating Issues~~

~~*(a) Pre-Trial Conference.* In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:~~

~~(1) the simplification of the issues;~~

~~(2) the necessity or desirability of amendments to the pleadings;~~

~~(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;~~

~~(4) the limitation of the number of expert witnesses;~~

~~(5) the advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;~~

~~(6) such other matters as may aid in the disposition of the action.~~

~~*(b) Pre-Trial Order.*—The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.~~]

Rule 16. Postassignment Conferences—Scheduling—Management

(a) *Postassignment Conferences—Objectives.* In any action, the judge to whom the action is assigned may in his discretion direct the attorneys for the parties and any unrepresented parties to appear for a conference or conferences for such purposes as

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the action will not be protracted because of lack of management;

(3) discouraging wasteful activities;

(4) improving the quality of the proceedings for the final disposition of the action through more thorough preparation; and

(5) facilitating the settlement of the action.

(b) *Scheduling and Planning.* Except when the judge to whom the action is assigned finds that a scheduling order will not aid in the disposition of the action and enters an order to that effect, together with a statement of reasons and facts upon which the order is based, the judge shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file and hear motions; and

(3) to complete discovery.

The scheduling order also may include

(4) the date or dates for conferences before submission of the action for final disposition, a final postassignment conference, and trial or submission of a dispositive motion; and

(5) any other matters appropriate in the circumstances of the action.

The scheduling order, or the order that a scheduling order will not aid in the disposition of the action, shall issue as soon as practicable but in no event more than 90 days after the action is assigned. A schedule shall not be modified except by leave of the judge upon a showing of good cause.

(c) *Subjects to be Discussed at Postassignment Conferences.* The participants at any conference under this rule may consider and take action with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regard-

ing the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence;

(5) the identification of witnesses and documents, the need and schedule for filing and exchanging briefs, and the date or dates for further conferences and for submission of the action for final disposition;

(6) the advisability of referring matters to a master;

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(8) the form and substance of the scheduling or postassignment conference order;

(9) the disposition of pending motions;

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(11) access to confidential or privileged information contained in an administrative record, which is the subject of the action; and

(12) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any postassignment conference shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

(d) *Final Postassignment Conference.* Any final postassignment conference shall be held as close to the time of submission of the action for final disposition as reasonable under the circumstances. The participants at any such conference shall formulate a plan for submission of the action for final disposition. At least one of the attorneys on behalf of each of the parties and any unrepresented parties shall participate in the conference.

(e) *Orders.* After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final postassignment conference shall be modified only to prevent manifest injustice.

(f) *Sanctions.* If a party or party's attorney fails to obey a scheduling or postassignment conference order, or if no appearance is made on behalf of a party at a scheduling or postassignment conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or his own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b) (2), (3), and (4). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney

representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

PRACTICE COMMENT: The attorneys for the parties and any unrepresented parties are expected to consult prior to a postassignment conference. The consultations should pertain to such matters as: access to the confidential portions of the administrative record, if any; the definition of the issues; whether discovery is necessary or permissible; and, the establishment of a proposed discovery schedule, if it is agreed that discovery will be conducted.

(As amended, eff. Jan. 1, 1985.)

Amendment to Rule 23

Rule 23 would be amended as follows:

Rule 23. Class Actions

(a) *Prerequisites to a Class Action.* * * *

(b) *Class Actions Maintainable.* * * *

(1) * * *

(2) * * *

(3) * * *

(c) *Determination by Order Whether Class Action To Be Maintained—Notice—Judgment—Actions Conducted Partially as Class Actions.*

(1) * * *

(2) * * *

(3) * * *

(4) * * *

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16[~~(b)~~], and may be altered or amended as may be desirable from time to time.

(e) *Dismissal or Compromise.* * * *

(As amended, eff. Jan. 1, 1985.)

Amendment to Rule 24

Rule 24 would be amended as follows:

Rule 24. Intervention

(a) *Intervention of Right.* * * *

(b) *Permissive Intervention.* * * *

(c) *Procedure.* * * *

PRACTICE COMMENT: * * *

PRACTICE COMMENT: Permissive intervention in this court is subject to the statutory provisions of 28 U.S.C. § 2631(j).

(As amended, eff. Jan. 1, 1985.)

Amendments to Rule 26

Rule 26 would be amended as follows:

Rule 26. General Provisions Governing Discovery

(a) *Discovery Methods.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. **[**~~Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.~~**]**

(b) **[**~~*Scope of Discovery*~~**]** ***Discovery Scope and Limits.*** Unless otherwise limited by order of the court as prescribed by these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake

in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

(2) Insurance Agreements. * * *

(3) Trial Preparation—Materials. Subject to the provisions of paragraph (4) of this subdivision (b), a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (1) of this subdivision (b) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. **The provisions of Rule 37(a)(3) apply to the award of expenses incurred in relation to the motion.** For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation—Experts. * * *

(A) * * *

(B) * * *

(C) * * *

(c) *Protective Orders.* Upon its own initiative, or upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden, delay or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret

or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. [~~If the motion for a protective order is denied in whole or in part, the court may on such terms and conditions as are just, order that any party or person provide or permit discovery.~~]

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(3) apply to the award of expenses incurred in relation to the motion.

(d) *Sequence and Timing of Discovery.* * * *

(e) *Supplementation of Responses.* * * *

(1) * * *

(2) * * *

(3) * * *

(f) *Discovery Conference.* At any time after the filing of a complaint the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon [~~request~~] **motion** by the attorney for any party if the [~~request~~] **motion** includes:

(1) [~~a~~] A statement of the issues as they then appear;

(2) [~~a~~] A proposed plan and schedule of discovery;

(3) [~~any~~] Any limitations proposed to be placed on discovery;

(4) [~~any~~] Any other proposed orders with respect to discovery; and

(5) [~~a~~] A statement showing that the attorney making the [~~request~~] **motion** has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the [~~request~~] **motion. Each party and his attorney are under a duty to participate in good faith in the farming of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.**

[~~Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the request shall be served on all parties. Objections or additions to matters set forth in the request shall be served no later than 10 days after service of the request.~~]

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any [~~,~~]; and determining such other matter, including the allocation of [~~costs~~] **expenses**, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly [~~requests~~] moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a [~~pretrial~~] post-assignment conference authorized by [~~Rule 16(a)~~] Rule 16.

(g) ***Signing of Discovery Requests, Responses, and Objections.*** Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address and telephone number. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

[~~g~~] (h) *Costs.* * * *

(As amended, eff. Jan. 1, 1985.)

Amendment to Rule 29

Rule 29 would be amended as follows:

Rule 29. [~~Stipulation~~] **Stipulations** Regarding Discovery Procedure

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery, **except that stipulations extending the time provided in**

Rules 33, 34, and 36 for responses to discovery may be made only with the approval of the court.

(As amended, eff. Jan. 1, 1985.)

Amendments to Rule 30

Rule 30 would be amended as follows:

Rule 30. Depositions Upon Oral Examination

(a) *When Depositions May Be Taken.* * * *

(b) *Notice of Examination—General Requirements—Special Notice—Nonstenographic Recording—Production of Documents and Things—Deposition of Organization—Deposition by Telephone.*

(1) * * *

(2) * * *

(3) * * *

(4) * * *

(5) * * *

(6) * * *

(7) * * *

(c) *Examination and Cross-Examination—Record of Examination—Oath—Objections.* * * *

(d) *Motion To Terminate or Limit Examination.* At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, delay, embarrass, or oppress the deponent or party, the court may order the officer conducting the examination to cease from taking the deposition, or may limit the scope and manner of the taking of the deposition as prescribed by Rule 26(c). If the order terminates the examination, it shall be resumed thereafter only upon the order of the court. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. **The provisions of Rule 37(a)(3) apply to the award of expenses incurred in relation to the motion.**

(e) *Submission to Witness—Changes—Signing.* * * *

(f) *Certification and Filing by Officer—Exhibits—Copies—Notice of Filing.*

(1) * * *

(2) * * *

(3) * * *

(g) ***Failure to Attend or to Serve Subpoena—Expenses.***

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(As amended, eff. Jan. 1, 1985.)

Amendment to Rule 33

Rule 33 would be amended as follows:

Rule 33. Interrogatories to Parties

(a) *Availability—Procedures for Use.* Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after filing of the complaint and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objections shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The Court may **[**~~order, or the parties may agree to,~~**]allow** a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) *Scope—Use at Trial.* Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a **[**~~pretrial~~**]postassignment** conference or other later time.

(c) *Option To Produce Business Records.* * * *

(As amended, eff. Jan. 1, 1985.)

Amendments to Rule 36

Rule 36 would be amended as follows:

Rule 36. Requests for Admission

(a) *Request for Admission.* A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after filing of the compliant, and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as **[**~~the parties may agree, or~~**]** the court may **[**~~order~~**]** **allow**, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the count shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the **summons and complaint** upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, **subject to the provisions of Rule 37(c)**, deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amendment answer be served. The court may, in lieu of these orders, determine that final disposi-

tion of the request be made a [~~pre-trial~~] **postassignment** conference or at a designated time prior to trial. **The provisions of Rule 37(a)(3) apply to the award of expenses incurred in relation to the motion.**

(b) *Effect of Admission.* Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of [~~Rule 16(b)~~] **Rule 16** governing amendment of a [~~pre-trial~~] **postassignment scheduling or conference** order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

(As amended, eff. Jan. 1, 1985.)

Amendments to Rule 37

Rule 37 would be amended as follows:

Rule 37. Failure To Make or Cooperate in Discovery—Sanctions

(a) *Motion for Order Compelling Discovery.* * * *

(1) Motion.

* * * * * * *

(2) Evasive or Incomplete Answer. * * *

(3) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) *Failure To Comply With Order.* * * *

(1) * * *

(2) * * *

(3) * * *

(4) * * *

(5) * * *

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) ***Expenses on Failure to Admit.*** **If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.**

[~~(c)~~**]** **(d)** *Failure of Party To Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(4) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court **[**~~,~~**]** on motion **[**~~,~~**]** may make such orders in regard to the failure as are just, and among others it may take any action authorized under subdivisions (b)(1), (b)(2) and (b)(3) of this rule. **In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. [**~~The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).~~**]**

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

[~~(d)~~**]** **(e)** *Subpoena of Person in Foreign Country.* * * *

(f) ***Failure to Participate in the Framing of a Discovery Plan.*** **If a party or his attorney fails to participate in good faith in the fram-**

ing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

(As amended, eff. Jan. 1, 1985.)

Amendments to Rule 38

Rule 38 would be amended as follows:

Rule 38. Jury Trial of Right

(a) *Right Preserved.* The right of trial by jury **[**,**]** as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States **[**,**]** shall be preserved **[**, ~~inviolate~~**]** to the parties **inviolate.**

(b) *Demand.* * * *

(c) *Demand—Specification of Issues.* * * *

(d) *Waiver.* * * *

(As amended, Jan. 1, 1985.)

Amendments to Rule 41

Rule 41 would be amended as follows:

Rule 41. Dismissal of Actions

(a) *Voluntary Dismissal—Effect Thereof.*

(1) By Plaintiff—By Stipulation. * * *

(2) By Order of Court. * * *

(b) *Involuntary Dismissal—Effect Thereof.*

(1) * * *

(2) Whenever it appears that an **[**~~assigned~~**]** action is not being prosecuted with due diligence, the court may upon its own initiative after notice, or upon motion of a defendant, order the action dismissed for lack of prosecution.

(3) * * *

(4) * * *

(c) *Insufficiency of Evidence.* * * *

(d) *Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim.* * * *

(e) *Costs of Previously Dismissed Action.* If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(As amended, eff. Jan. 1, 1985.)

Amendment to Rule 43

Rule 43 would be amended as follows:

Rule 43. Taking of Testimony*

(a) *Form.* * * *

(b) *Affirmation in Lieu of Oath.* * * *

(c) *Evidence on Motions.* * * *

(d) *Interpreters.* The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, **and may be taxed ultimately as costs, in the discretion of the court.**

(e) *Documents Specially Admissible.*

(1) Reports—Depositions—Affidavits. * * *

(2) Service. * * *

(3) Objections. * * *

(4) Pricelists—Catalogs. * * *

(As amended, eff. Jan. 1, 1985.)

Amendment to Rule 52

Rule 52 would be amended as follows:

Rule 52. Findings by the Court

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of this court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. [~~If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.~~] **It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court.**

(b) *Amendment.* * * *

(As amended, eff. Jan. 1, 1985.)

Amendment of Rule 53

Rule 53 would be amended as follows:

Rule 53. Masters

(a) *Appointment and Compensation.* * * *

(b) *Reference.* * * *

*As provided in 28 U.S.C. § 2641(a), the Federal Rules of Evidence apply to all actions in this court, except as provided in 28 U.S.C. §§ 2639 and 2641(b), or the rules of the court.

(c) *Powers.* The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided **in the Federal Rules of Evidence** for a court sitting without a jury.

(d) *Proceedings.* * * *

(1) Meetings. * * *

(2) Witnesses. * * *

(3) Statement of Accounts. * * *

(e) *Report.*

(1) Contents and Filing. * * *

(2) In Non-Jury Actions. * * *

(3) In Jury Actions. * * *

(4) Stipulation as to Findings. * * *

(5) Draft Report. * * *

(As amended, eff. Jan. 1, 1985.)

Amendment to Rule 56

Rule 56 would be amended as follows:

Rule 56. Summary Judgment

(a) *For Claimant.* * * *

(b) *For Defending Party.* * * *

(c) *When Leave Is Required.* * * *

(d) *Motion and Proceedings Thereon.* * * *

(e) *Case Not Fully Adjudicated on Motion.* * * *

(f) *Form of Affidavits—Further Testimony—Defense Required.* * * *

(g) *When Affidavits Are Unavailable.* * * *

(h) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, **the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable**

expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(i) *Annexation of Statement.* * * *

(As amended, eff. Jan. 1, 1985.)

Amendments to Rule 56.1

Rule 56.1 would be amended as follows:

Rule 56.1 [~~Motion for Review of Administrative Determinations Upon an Agency Record~~

~~(a) *Motion for Review.* After issue is joined in any action in which the determination of the court is to be made solely upon the basis of the record made before an agency, and in which there is no substantial controversy as to any material fact to be tried, the court, on its own initiative or on motion of any party, may direct that the matter be submitted for determination by a motion for review.~~

~~(b) *Time.* Within 20 days after service of an order directing a motion for submission, the plaintiff shall serve its motion. A response shall be made within 30 days after service of the motion. The time to move, or to respond, may be shortened by the court for good cause shown.~~

~~(c) *Motion Papers and Briefs.* In addition to the other requirements prescribed by these rules, the motion papers and briefs submitted on the motion, either contesting or supporting the agency determination, shall include a statement setting forth in separate numbered paragraphs:~~

~~(1) The administrative determination sought to be reviewed with appropriate reference to the Federal Register.~~

~~(2) The issues of law presented together with the reasons for contesting or supporting the administrative determination, specifying how the determination may be arbitrary, capricious, an abuse of discretion, not otherwise in accordance with the law, unsupported by substantial evidence or how the determination may have failed to consider facts which, as a matter of law, should have properly been considered. The party should include the authorities relied upon and the conclusions of law deemed warranted by the authorities.~~

~~(3) The issues of fact being raised together with a specification of how one of the standards of administrative action mentioned above has been or has not been violated.~~

~~(4) All references to the administrative record shall be made by citing the portions of the record to the factual or legal issues raised. Citations shall be by page number of the transcript, if any, and by specific identification of exhibits together with the relevant page number.~~

~~(d) *Supplemental Briefs.* Supplemental briefs or memoranda may be required by the court with respect to such particulars as may be designated.~~]

Rule 56.1 Judgment Upon an Agency Record

(a) *Motion for Judgement.* After issue is joined in any action in which a party believes that the determination of the court is to be made solely upon the basis of the record made before an agency,

that party may move for judgment in its favor upon all or any part of the agency determination.

(b) *Cross-Motions.* When a motion for judgment upon an agency record is filed by a party, an opposing party shall not file a cross-motion for judgment upon an agency record. If the court determines that judgment ought to be entered in favor of an opposing party, it may enter judgment in favor of that party, notwithstanding the absence of a cross-motion.

(c) *Briefs.*

(1) In addition to the other requirements prescribed by these rules, the briefs submitted on the motion, either contesting or supporting the agency determination, shall include a statement setting forth in separate numbered paragraphs:

(A) The administrative determination sought to be reviewed with appropriate reference to the Federal Register; and

(B) The issues of law presented together with the reasons for contesting or supporting the administrative determination, specifying how the determination may be arbitrary, capricious, an abuse of discretion, not otherwise in accordance with law, unsupported by substantial evidence; or, how the determination may be unwarranted by the facts to the extent that the agency may or may not have considered facts which, as a matter of law, should or should not have been properly considered.

(2) The brief shall include the authorities relied upon and the conclusions of law deemed warranted by the authorities. All references to the administrative record shall be made by citing the portions of the record to the factual or legal issues raised. Citations shall be by page number of the transcript, if any, and by specific identification of exhibits together with the relevant page number.

(d) *Time to Respond.* A response to a motion for judgment upon an agency record shall be served within 30 days after service of the motion. The moving party shall have 10 days after service of the response to the motion to serve a reply. No other papers or briefs shall be allowed, except by leave of court.

(e) *Hearing.* Upon motion of a party, or upon its own initiative, the court may direct oral argument on a motion for judgment upon an agency record at a time and place designated as prescribed in Rule 77(c).

(f) *Partial Judgment.* After considering a motion filed under this rule, the court may grant judgment in whole or in part in favor of any party.

PRACTICE COMMENT: An action in which the determination of the court is to be made solely upon the basis of a record made before an agency shall be submitted for determination pursuant to this rule unless the court otherwise directs.

PRACTICE COMMENT: As required by Rule 81(l), a reply brief in an action submitted for determination pursuant to this rule

shall be confined to rebutting matters contained in the brief of the responding party.

(As amended, eff. Jan. 1, 1985.)

Amendment to Rule 58

Rule 58 would be amended as follows:

Rule 58. Entry of Judgments, Decrees or Final Orders

Subject to the provisions of Rule 54(b), a judgment, decree or final order shall be entered upon every final decision from which an appeal lies, except an order of dismissal **either** pursuant to Rule 41(b)(1), **or in an unassigned action pursuant to Rule 41(b)(2).** Every such judgment, decree or final order shall be set forth on a separate document, signed by the court, and promptly entered by the clerk. A judgment, decree or final order is effective only when so set forth and entered as prescribed by Rule 79(a). Proposed forms of judgments, decrees or final orders shall not be submitted except upon direction of the court, or as required by these rules.

(As amended, eff. Jan. 1, 1985.)

Amendments to Rule 59

Rule 59 would be amended as follows:

Rule 59. New Trials—Rehearings—Amendment of Judgments

(a) *Grounds.* * * *

(b) *Time for Motion.* * * *

(c) *Time for Serving Affidavits.* When a motion for a new trial **or rehearing** is based upon affidavits, they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days by order of the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) *On Initiative of Court.* Not later than 30 days after the entry of the judgment or order **[**,**]** the court on its own initiative may order a new trial **or rehearing** for any reason for which it might have granted a new trial **or rehearing** on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial **or rehearing,** timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(3) *Motion To Alter or Amend a Judgment.* * * *

(As amended, eff. Jan. 1, 1985.)

Amendment to Rule 60

Rule 60 would be amended as follows:

Rule 60. Relief From Judgment or Order

(a) *Clerical Mistakes.* * * *

(b) *Mistakes, Inadvertence, Excusable Neglect—Newly Discovered Evidence—Fraud, Etc.* On motion of a party or upon its own initiative and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence **which by due diligence could not have been discovered in time to move for a new trial or rehearing under Rule 59(b);** (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. A motion of a party shall be served and filed not later than 30 days after the **[**~~date of entry of the~~**]** judgment, **[**~~or~~**]** order, **or proceeding was entered or taken.** The court, upon its own initiative, may also grant relief from a judgment or order as prescribed by this rule not later than 30 days after the date of entry of the judgment or order.

This rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, **order, or proceeding,** or to grant relief to a defendant not actually personally notified as provided in 28 U.S.C. § 1655, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(As amended, eff. Jan. 1, 1985.)

Amendment to Rule 62

Rule 62 would be amended as follows:

Rule 62. Stay of Proceedings To Enforce a Judgment

(a) *Automatic Stay—Exception—Injunctions.* * * *

(b) *Stay on Motion for New Trial or Rehearing, or for Judgment.* In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of a judgment or any proceedings to enforce a judgment **[**~~,~~**]** pending the disposition of a motion for a new trial **or rehearing** or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) *Injunction Pending Appeal.* * * *

(d) *Stay Upon Appeal.* * * *

(e) *Stay in Favor of the United States or Agency Thereof.* * * *

(f) *Stay According to State Law.* * * *

(g) *Stay of Judgment as to Multiple Claims or Multiple Parties.* * * *

(As amended, eff. Jan. 1, 1985.)

Amendments to Rule 67

Rule 67 would be amended as follows:

Rule 67. Deposit in Court

In an action in which any part of the relief sought is a judgmet for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing **[**~~,~~**] , whether or not that party claims all or any part of the sum or thing. The party making the deposit shall serve the order permitting deposit on the clerk of the court.** Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of 28 U.S.C. §§ 2041, and 2042; the Act of June 26, 1934, **[**~~ch.~~**] c.** 756, § 23, as amended (48 Stat. 1236, 58 Stat. 845), 31 U.S.C. § 725v; or any like statute. **The fund shall be deposited in an interest-bearing account or invested in an interest-bearing instrument approved by the court.**

(As amended, eff. Jan. 1, 1985.)

Rule 68

Rule 68 would read as follows:

Rule 68. Attorney's Fees and Expenses

(a) *Time for Filing.* The court may award attorney's fees and expenses where authorized by law. Applications must be filed within 30 days after the date of entry by the court of a final judgment.

(b) *Content of Application.* Each application for attorney's fees and expenses as provided for in subdivision (a) shall contain a citation to the authority which authorizes an award, and shall indicate the manner in which the prerequisites for an award have been fulfilled. In addition, each application shall contain a statement, under oath, which specifies:

(1) the nature of each service rendered;

(2) the amount of time expended in rendering each type of service; and

(3) the customary charge for each type of service rendered.

(c) *Response and Reply.* The responding party shall have 30 days from the date of service of the application to file a response. No other papers or briefs shall be allowed, except as the court, upon its own initiative, shall direct.

PRACTICE COMMENT: An application for attorney's fees and expenses shall be substantially in the form set forth in Form 15 of the Appendix of Forms.

(As added, eff. Jan. 1, 1985.)

Amendment to Rule 74

Rule 74 would be amended as follows:

Rule 74. Admission to Practice*

(a) *Qualifications.* An attorney of good moral character who has been admitted to practice before the Supreme Court of the United States, the highest court of any state, the District of Columbia, a territory or possession, any United States court of appeals, [~~the United States Court of Customs and Patent Appeals,~~] or any United States district court, and is in good standing therein, may be admitted to practice before this court.

(b) *Procedure.*

(1) * * *

(2) * * *

(3) * * *

(c) *Admission of Foreign Attorneys.* * * *

(d) *Pro Hac Vice Applications.* * * *

(e) *Disbarment or Other Disciplinary Action.*

(1) Initiation of Proceedings. * * *

(A) * * *

(B) * * *

(C) * * *

(D) * * *

(2) Sufficiency. * * *

(3) Investigation and Prosecution. * * *

(4) Appearance. * * *

(5) Hearing and Report. * * *

(6) Action by the Court. * * *

(As amended, eff. Jan. 1, 1985.)

Amendment to Rule 79

Rule 79 would be amended as follows:

Rule 79. Books and Records Kept by the Clerk and Entries Therein

(a) *Civil Docket.* * * *

(b) *Judgments and Orders.* * * *

(c) *Notice of Orders or Judgments.*

(1) * * *

(2) * * *

(3) Lack of notice of the entry by the clerk does not affect the time to appeal or relieve, or authorize the court to relieve, a party for failure to appeal within the time allowed, except as permitted **in Rule 4(a) of the Federal Rules of Appellate Procedure or** by the rules of the [~~United States Court of Customs and Patent Appeals~~] **United States Court of Appeals for the Federal Circuit.**

(As amended, eff. Jan. 1, 1985.)

*An attorney admitted to practice before the United States Customs Court shall be deemed to be admitted to practice before the United States Court of International Trade.

Amendments to Rule 81

Rule 81 would be amended as follows:

Rule 81. Papers Filed—Conformity—Form, Size, Copies

(a) *Conformity Required.* All papers filed with the court shall be produced, duplicated, and filed in conformity with these rules as to means of production, methods of duplication, form and size, and number of copies. [~~The clerk shall refuse to file any paper, or shall return without further processing a paper which has been filed, which is not in substantial conformity with these rules. A party aggrieved by such action may move to compel the clerk to accept the paper for filing.~~]

(b) *Means of Production.* * * *

(c) *Caption and Signing.* * * *

(d) *Numbering of Pages.* * * *

(e) *Designation of Originals.* * * *

(f) *Pleadings and Other Papers.* * * *

(g) *Status of Action.* * * *

(h) *Confidential Information.*

(1) If a party deems it necessary to refer in a pleading, motion, brief or other paper to confidential or privileged information, two sets of the pleadings, motions, briefs or other papers shall be filed.

(a) *Confidential Set.* One set of the pleadings, motions, briefs or other papers shall be labeled "Confidential" on the cover page and be filed with the clerk of the court. In addition, each page containing confidential material shall bear a legend so indicating.

(b) *Nonconfidential Set.* The second set of pleadings, motions, briefs or other papers shall be labeled "Nonconfidential" on the cover page and be filed with the clerk of the court. In addition, each page of the "nonconfidential" set from which confidential or privileged information has been deleted shall bear a legend so stating.

(2) Each party to the action shall be served with one copy of the "nonconfidential" pleading, motion, brief or other paper, and, when permitted by an applicable protective order, one copy of the "confidential" pleading, motion, brief or other paper, in accordance with Rule 5.

(3) *Non-Availability to the Public.* The "confidential" set of pleadings, motions, briefs or other papers filed with the court shall be available only to authorized court personnel and shall not be made available to the public.

[~~(h)~~] **(i)** *Briefs—Trial and Pretrial Memoranda.* * * *

[~~(i)~~] **(j)** *Content*—[~~Plaintiff's~~] **Moving Party's** *Brief.* [~~Plaintiff's~~] **The brief of the moving party** shall contain under proper headings and arranged in the following order:

(1) * * *

(2) * * *

(3) * * *

(4) * * *

(5) * * *
(6) * * *
(7) * * *
(8) * * *
(9) * * *

[~~(j)~~**] (k)** *Content*—**[**~~Defendant's~~**] Respondent's** *Brief.* The brief of the **[**~~defendant~~**] respondent** shall conform to the requirements prescribed in subdivision **[**~~(i)~~**] (j)** of this rule, except that no statement of the facts need be made beyond what may be deemed necessary to correct any inaccuracies or omissions in **[**~~plaintiff's~~**] the moving party's** brief, and except that items (3), (4) and (5) need not be included unless the **[**~~defendant~~**] respondent** is dissatisfied with their presentation by the **[**~~other side~~**] moving party.**

[~~(k)~~**] (l)** *Content—Reply Brief.* A reply brief shall be confined to rebutting matters contained in the brief of the **[**~~defendant~~**] respondent.**

[~~(l)~~**] (m)** *General.* * * *

PRACTICE COMMENT: All decisions of the United States Court of International Trade are published in: slip opinion form, the Customs Bulletin, and the official reports of the United States Court of International Trade. Certain decisions will also be published in the Federal Supplement or the Federal Rules Decisions.

[~~The forms of citation to decisions of the court are as follows:~~

~~1. A slip opinion number (Slip Op.) is assigned to a decision on the date of publication and is used as the official citation, together with the date of publication, until the opinion appears in the official reports. The form of citation to a slip opinion is *Smith* v. *United States*, 1 CIT —, Slip Op. 80–1 (November 1, 1980).~~

~~2. After a decision appears in the official reports, the slip opinion number is not used, and the citation is to the volume and page of the official reports together with the year of publication, e.g., *Smith* v. *United States*, 1 CIT 20 (1980).~~

~~3. When a decision is also published in the Federal Supplement or the Federal Rules Decisions, citation to these reports is included following the citation to the official reports:~~

~~a. *Smith* v. *United States*, 1 CIT —, Slip Op. 80–1, 480 F.Supp. 123 (November 1, 1980) [or 90 F.R.D. 100 (November 1, 1980)].~~

~~b. *Smith* v. *United States*,1 1 CIT 20, 480 F. Supp. 123 (1980) [or 90 F.R.D. 100 (1980)].~~

~~The form of citation to decisions of the United States Customs Court remains the same: 65 Cust. Ct. 100, C.D. 4000, 490 F.Supp. 123 (1980).~~

~~Citations to statutes of the United States in decisions of the court and in briefs or other papers submitted to the court include both the name and section of the statute and the title and section of the United States Code, e.g., section 516A(a)(1) of the Trade Agreements Act of 1979 (19 U.S.C. 1516a(a)(1)).~~**]**

The rules of citation for papers filed in the court are as follows:

1. *Slip Opinions*

When citing a slip opinion, one should cite the slip opinion number, together with the volume number of the official reports, if available, and full date of publication. This form is used until the opinion appears in full in the *United States Court of International Trade Reports* (CIT).

Examples

Carlisle Tire and Rubber Co. v. *United States,* 5 CIT ——, Slip Op. 83–43 (May 18, 1983);

OR, if the volume number is not available, —— CIT ——, Slip Op. 83–43 (May 18, 1983).

2. *Published Opinions*

After an opinion appears in the official CIT reports, *Federal Supplement* (F.Supp.), or *Federal Rules Decisions* (F.R.D.), the slip opinion is no longer used, and the citation is to the official reports, and unofficial reports, if available, together with the year of publication. One should not cite the Customs Bulletin and Decisions in any event.

Example

American Shack Co. v. *United States,* 1 CIT 1 (1980.

If the opinion is also published in F.Supp. or F.R.D., citation of these reporters should follow the citation of the official reports.

Examples

Zenith Radio Corp. v. *United States,* 1 CIT 53, 505 F.Supp. 216 (1980) [or 99 F.R.D. 100 (1980)];

NOT,

1 CIT 53, Slip Op. 80–10, 505 F.Supp. 216 (1980).

3. *Custom Court Opinions*

The form of citation for opinions of the United States Customs Court remains the same.

Examples

Labay Int'l, Inc. v. *United States,* 83 Cust. Ct. 152, C.D. 4834 (1979);

OR, if there is a F.Supp. or F.R.D. cite,

Alberta Gas Chems., Inc. v. *United States,* 84 Cust. Ct. 217, C.R.D. 80–1, 483 F.Supp. 303 (1980).

4. *Abstracts*

Abstracts of decisions not supported by an opinion should be numbered, published, and cited. These abstracts include decisions and judgments on agreed statements of facts, on motions for summary judgments, and on motions for judgments on the pleadings in only classification and valuation cases.

Examples

Uniroyal, Inc. v. *United States,* 84 Cust. Ct. 275, Abs. P80/59 (1980);

Nichimen Co. v. *United States,* 1 CIT 234, Abs. R81/20 (1981).

5. *Decisions of the Board of General Appraisers*

Citation of the decisions of the Board of General Appraisers should be as follows:

Example

***In re Pickhardt & Kuttroff,* T.D. 20,728, 1 Treas. Dec. 373 (1897).**

6. *Court of Customs Appeals Opinions*

Citation of the opinions of the Court of Customs Appeals (Ct. Cust. App.) should be as follows:

Example

***Kahlen* v. *United States,* 2 Ct. Cust. App 206 (1911).**

7. *Court of Customs and Patent Appeals*

Citation of opinions of the Court of Customs and Patent Appeals (CCPA) should be as follows:

Examples

***Coro, Inc.* v. *United States,* 41 CCPA 215, C.A.D. 554 (1954);**

OR, if there is an F.2d cite,

***United States* v. *Mabay Chem. Corp.,* 65 CCPA 53, C.A.D. 1206, 576 F.2d 368 (1978).**

8. *Court of Appeals for the Federal Circuit*

Due to the discontinuation of the CCPA Reports, all Federal Circuit opinions should be by F.2d cite or, if not available, by case number unless the Federal circuit decides to publish its opinions in a successor to the CCPA reporter.

Examples

***Nippon Kogaku (USA), Inc.* v. *United States,* 673 F.2d 380 (Fed. Cir. 1983),**

OR, if the F.2d cite is not available,

***Jarvis Clark Co.* v. *United States,* No. 83-1106 (Fed. Cir. May 2, 1984);**

NOT,

***Jarvis Clark Co.* v. *United States,* Appeal No. 83-1106, Slip Op. (C.A.F.C. May 2, 1984).**

9. *Statutes*

Citations of statutes of the United States should include both the popular name of the act and the title and section of the United States Code.

a) Citation of a statute as it appears in a sentence in text.

Example

Plaintiff moves for certification pursuant to section 222(3) of the Trade Act of 1974, 19 U.S.C. § 2272(3) (1982).

b) Citation standing alone.

Example

Trade Act of 1974, § 222(3), 19 U.S.C. § 2272(3) (1982).

10. Rules

Citation of the rules of this court and its predecessor court, the Customs Court, should be as follows:

a) Rules of the United States Court of International Trade

Example

USCIT R. 56

b) Rules of the United States Customs Court

Example

Cust. Ct. R. 4.6

11. *Miscellaneous*

***Ellipsis* (. . .)**

Pursuant to rule 5.3 of *A Uniform System of Citation,* when a word or words are omitted from quoted material it should be indicated by an ellipsis (. . .), and not asterisks * * *).

For further rules of citation, reference may be made to *A Uniform System of Citation* (The Harvard Law Review Association). For punctuation, capitalization, abbreviations, and other matters of style, reference may be made to the *U.S. Government Printing Office Style Manual.* Assistance in citing recent decisions of this court may be obtained from the **[~~office of the Reporter of Decisions (212-264-2815)~~] court librarian (212-264-2816).**

(As amended, eff. Jan. 1, 1985.)

Amendments to Rule 82

Rule 82 would be amended as follows:

Rule 82. Clerk's Office and Orders by the Clerk

(a) *Business Hours and Address.* * * *

(b) **[~~*Orders Signed by the Clerk.*~~] *Motions, Orders and Judgments.*** The clerk may **[~~sign~~] dispose of** the following types of **[~~orders~~] motions and sign the following types of orders and judgments** without submission to the court, but his action may be suspended, altered or rescinded by the court for good cause shown:

(1) **[~~Orders~~] Motions** on consent in unassigned cases extending the time within which to plead, move or respond.

(2) **[~~Orders~~] Motions** on consent in unassigned cases for the discontinuance or dismissal of the action.

(3) Orders of dismissal upon notice as prescribed by Rules 41(a)(1) **and 41(b)(2).**

(4) * * *

(5) * * *

(c) *Clerk—Definition.* * * *

(d) *Filing of Papers.* The clerk shall not accept for filing any pleading, motion brief or other paper, or shall return without further processing a paper which has been filed, which does not comply with the procedural requirements of the rules or practice of the court. A party aggrieved by such action may move to compel the clerk to accept the paper for filing.

PRACTICE COMMENT: Included among, but not limited to, the kinds of papers the clerk may not accept for filing pursuant to subdivision (d) of this rule, for failing to conform with the proce-

dural requirements of the rules or practice of the court, are the following: replies to non-dispositive motions without leave of court; discovery documents presented contrary to Rule 5(d); papers not signed as required by Rule 11; papers which do not correctly identify the status of actions as required by Rule 81(g); papers presented by an attorney who is not the attorney of record; and, papers presented after periods prescribed by the rules or orders of the court.

(As amended, eff. Jan. 1, 1985.)

Amendments to Rule 83

Rule 83 would be amended as follows:

Rule 83. Reserve Calendar

(a) *Reserve Calendar.* * * *

(b) *Removal.* An action may be removed from the Reserve Calendar **upon:** (1) **[**~~upon~~**]** assignment, (2) **[**~~upon~~**]** filing of a complaint, (3) **[**~~upon~~**]** granting of a motion for consolidation **pursuant to Rule 42, [**~~or for suspension, or~~**]** (4) **granting of a motion for suspension under a test case pursuant to Rule 84, or [4]** (5) **[**~~upon~~**]** filing of a **[**~~submission upon an~~**]** **stipulation for judgment on** agreed statement of facts **pursuant to Rule 58.1.**

(c) *Dismissal for Lack of Prosecution.* * * *

(d) *Notice.* * * *

(As amended, eff. Jan. 1, 1985.)

Amendments to Rule 85

Rule 85 would be amended as follows:

Rule 85. Suspension Disposition Calendar

(a) *Suspension Disposition Calendar.* * * *

(b) *Time—Notice.* * * *

(c) *Removal* **[**~~From Calendar~~**]**. An action may be removed from the Suspension Disposition Calendar upon: (1) filing of a complaint, (2) filing of a demand for an answer when a complaint previously was filed, (3) granting of a motion for consolidation pursuant to Rule 42, (4) granting of a motion for suspension under another test case pursuant to Rule 84, (5) filing of a **[**~~submission for decision upon an~~**]** **stipulation for judgment on** agreed statement of facts **pursuant to Rule 58.1,** (6) granting of a dispositive motion, (7) filing of a request for trial, or (8) granting of a motion for removal.

(d) *Dismissal for Lack of Prosecution.* * * *

(As amended, eff. Jan. 1, 1985.)

Amendments to Rule 86

Rule 86 would be amended as follows:

Rule 86. Joined Issue Calendar

(a) *Joined Issue Calendar.* A Joined Issue Calendar is established on which an unassigned action shall be placed when issue is joined. An action may remain on the Joined Issue Calendar for a **[**~~12-month~~**]** **6-month** period. The applicable **[**~~12-month~~**]** **6-month** period shall run from the last day of the month in which the answer was filed until the last day of the **[**~~12th~~**]** **6th** month thereafter.

(b) *Dismissal.* At the expiration of the applicable **[**~~12-month~~**]** **6-month** period an unassigned action on the Joined Issue Calendar shall be dismissed for lack of prosecution, and the clerk shall enter an order of dismissal without further direction from the court unless a motion is pending.

(c) *Notice.* * * *

(As amended, eff. Jan. 1, 1985.)

Rule 87

Rule 87 would read as follows:

Rule 87. Forms

The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

(As added, eff. Jan. 1, 1985.)

Rule 88

Rule 88 would read as follows:

Rule 88. Title

These rules may be known and cited as the Rules of the United States Court of International Trade.

(As added, eff. Jan. 1, 1985.)

Rule 89

Rule 89 would read as follows:

Rule 89. Effective Date

(a) *Effective Date of Original Rules.* These rules shall take effect on November 1, 1980, the effective date of the Customs Courts Act of 1980. They govern all proceedings in actions commenced thereafter and then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work an injustice, in which event the former procedure applies. However, when a party is required or has been requested prior to the effective date of these rules to perform an act, pursuant to the Rules of the United States Customs Court in effect prior to the effective date of these rules, the act may still be performed in accordance with the rules in effect prior to the effective date of these rules.

(b) *Effective Date of Amendments.* The amendments adopted by the court on November 4, 1981, shall take effect on January 1,

1982. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(c) *Effective Date of Amendment.* The amendment adopted by the court on December 29, 1982, shall take effect on January 1, 1983. It governs all proceedings in actions brought after it takes effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court its application in a particular action pending when the amendment take effect would not be feasible or would work injustice, in which event the former procedure applies.

(d) *Effective Date of Amendments.*

(1) The amendments adopted by the court on October 3, 1984, shall take effect on January 1, 1985. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except as provided for in paragraph (2) of this subdivision.

(2)(A) Rule 16 shall apply to all actions assigned on or after the effective date of these amendments and may apply to any action assigned before the effective date at the discretion of the judge to whom the action is assigned.

(B) As to pending actions, the amendments apply, except to the extent that in the opinion of the court their application would not be feasible or would work injustice, in which event the former procedure applies.

(As added, eff. Jan. 1, 1985.)

FORM 5

UNITED STATES COURT OF INTERNATIONAL TRADE
INFORMATION STATEMENT

(PLACE AN "X" IN APPLICABLE ☐)

PLAINTIFF	PRECEDENCE
ATTORNEY (Name, Address, Telephone No.)	If the action is to be given precedence under 28 USC 2647, indicate the applicable paragraph of that section: ☐ (1) ☐ (3) ☐ (2) ☐ (4)

JURISDICTION

28 USC 1581(a) — Tariff Act of 1930, Section 515 — 19 USC 1515
☐ Appraisal ☐ Classification ☐ Charges or Exactions ☐ Exclusion ☐ Redelivery
☐ Liquidation ☐ Drawback ☐ Refusal to Reliquidate ☐ Rate of Duty

28 USC 1581(b) — Tariff Act of 1930, Section 516 — 19 USC 1516
☐ Appraisal ☐ Classification ☐ Rate of Duty

28 USC 1581(c) — Tariff Act of 1930, Section 516A(a)(1) or Section 516A(a)(2) — 19 USC 1516a
(Cite the specific subparagraph and clause of Section 516A(a)(1) or 516A(a)(2), and provide a brief description of the administrative determination you are contesting, including the relevant Federal Register citation(s) and the product(s) involved in the determination.)
Subparagraph and Clause _____ Agency _____
Federal Register Cite(s) _____ Product(s) _____

28 USC 1581(d) — Trade Act of 1974 — 19 USC 2273, 2341, 2371
☐ Secretary of Labor ☐ Secretary of Commerce

28 USC 1581(e) — Trade Agreements Act of 1979, Section 305(b)(1) — 19 USC 2515
(Provide a brief statement of the final determination to be reviewed.)

28 USC 1581(f) — Tariff Act of 1930, Section 777(c)(2) — 19 USC 1677f
Agency involved. ☐ I.T.C ☐ Administering Authority

28 USC 1581(g) — Tariff Act of 1930, Section 641 — 19 USC 1641
☐ (1) Section 641(a) ☐ (2) Section 641(b)

28 USC 1581(h) — Ruling relating to:
☐ Classification ☐ Valuation ☐ Rate of Duty ☐ Marking
☐ Restricted Merchandise ☐ Entry Requirements
☐ Drawbacks ☐ Vessel Repairs ☐ Other

28 USC 1581(i) (Cite any applicable statute and provide a brief statement describing jurisdictional basis.)

28 USC 1582 — Actions Commenced by the United States
☐ (1) Recover civil penalty under Tariff Act of 1930
☐ Section 592 ☐ Section 704(i)(2) ☐ Section 734(i)(2)
☐ (2) Recover upon a bond
☐ (3) Recover customs duties

RELATED CASE

To your knowledge, does this action involve a common question of law or fact with another action previously decided or now pending?

	PLAINTIFF	COURT NUMBER	JUDGE
☐ Decided			
☐ Pending			

(As amended, eff. Jan. 1, 1985.)

Form 14

UNITED STATES COURT OF INTERNATIONAL TRADE, PLAINTIFF *v.* DEFENDANT

Court No. ——

NOTICE AND ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND COMPLAINT

To: (insert the name and address of the person to be served).

The enclosed summons and complaint are served pursuant to Rule 4(c)(1)(C)(ii) of the Rules of the United States Court of International Trade.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within 20 days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 20 days, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within 20 days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice and Acknowledgment of Receipt of Summons and Complaint was mailed on (insert date).

_____

Signature

_____

Date of Signature

Form 14—Page 2

ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND COMPLAINT

I declare, under penalty of perjury, that I received a copy of the summons and complaint in the above-captioned matter at (insert address).

_____

Signature

_____

Relationship to Entity/Authority to Receive Service of Process

_____

Date of Signature

(As added, eff. Jan. 1, 1985.)

Form 15

UNITED STATES COURT OF INTERNATIONAL TRADE, PLAINTIFF *v.* DEFENDANT

Court No. ——

Before:

APPLICATION FOR FEES AND OTHER EXPENSES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT, 28 U.S.C. § 2412(d), Title II of Public Law 96–481, 94 STAT. 2325 and USCIT R. 68.

1. Name of Applicant: _____
2. Government Agency involved in claim: XXXXXXXXXXXXX
3. Showing of Prevailing Party Status (28 U.S.C. § 2412(d)(1)(B)).
   Is court order attached? _____YES _____NO
4. Showing of eligibility (28 U.S.C. § 2412(d)(2)(B)).
   Is net worth information attached? _____YES _____NO
5. Enter allegation that Government position was not substantially justified (28 U.S.C. § 2412(d)(1)(B)).

Form 15—Page 2

6. For each amount claimed, please attach itemization information indicating service provided, date, hours, and rate (28 U.S.C. § 2412(d)(2)(A)).

	Amount Claimed
A. Attorney Fees	$
B. Study	
C. Analysis	
D. Engineering Report	
E. Test	
F. Project	
G. Expert Witness Fees	
H. Other Fees and Expenses—Specify	
1.	
2.	
3.	
I. Total Fees and Expenses	$

_____

Attorney for Applicant

_____

Name of Law Firm

_____

Street Address

_____

City, State and Zip Code

_____

Telephone Number

Date: _____

(As added, eff. Jan. 1, 1985.)

Index

U.S. Customs Service

Treasury Decision

U.S. Court of Appeals for the Federal Circuit

U.S. GOVERNMENT PRINTING OFFICE : 1984 O—456-410